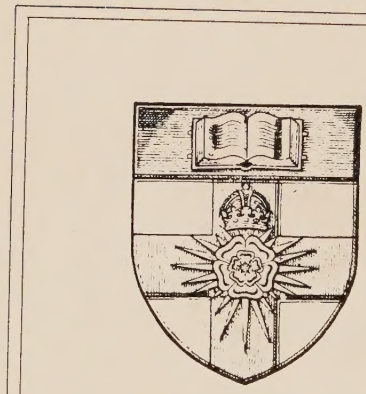
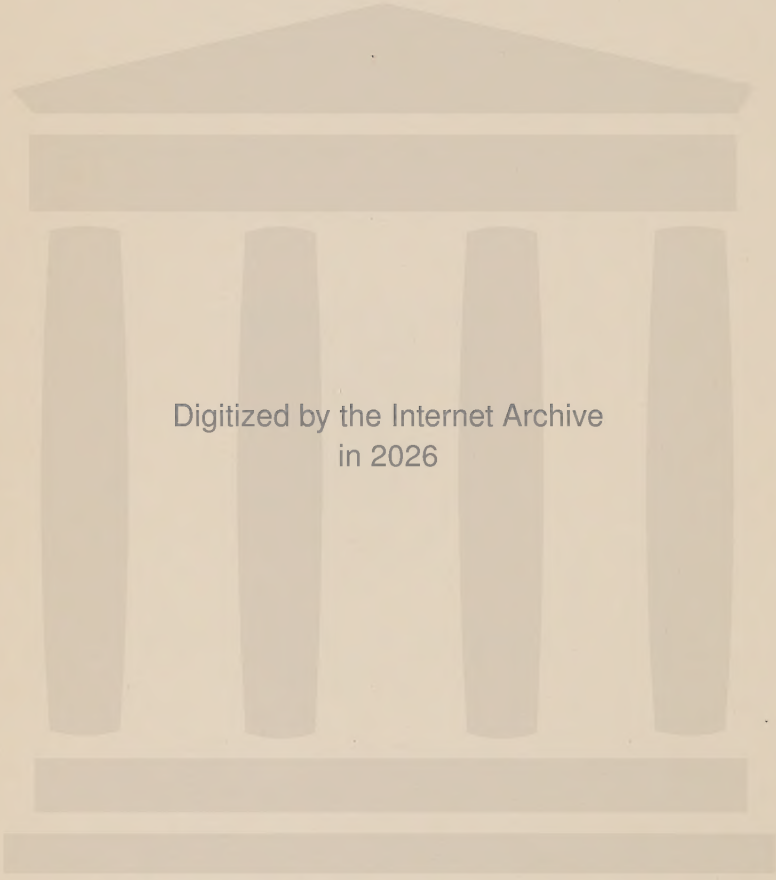
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

REFERENCE ONLY

346·4
Mac North
Reference Only



UNIVERSITY OF LONDON
LIBRARY


Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-chancery-division_1912_1

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—Sir F. A. Bosanquet, K.C.
Vice-Chairman—Robert F. Norton, Esq., K.C.

EX-OFFICIO MEMBERS.

Right Hon. Sir Rufus D. Isaacs, K.C.V.O., M.P.	Attorney-General
Sir J. A. Simon, K.C.V.O., M.P.	Solicitor-General.
W. J. Humfrys, Esq., President of the Law Society.	

ELECTED MEMBERS.

P. Ogden Lawrence, Esq., K.C. A. R. Kirby, Esq.	Lincoln's Inn.
Sir F. A. Bosanquet, K.C. H. F. Dickens, Esq., K.C.	Inner Temple.
J. M. Astbury, Esq., K.C. C. C. Scott, Esq., K.C.	Middle Temple.
J. C. Lewis Coward, Esq., K.C. H. E. Duke, Esq., K.C., M.P.	Gray's Inn.
W. English Harrison, Esq., K.C., of the Middle Temple. Robert F. Norton, Esq., K.C., of Lincoln's Inn.	Appointed by the Council of Law Reporting on the nomination of the General Council of the Bar.
W. Melmoth Walters, Esq. (Firm—Messrs. Walters & Co.). J. W. Budd, Esq. (Firm—Messrs. Budd, Johnson & Jecks).	The Law Society.

Secretary—P. Noble Fawcett, Esq., 10, Old Square, Lincoln's Inn, London, W.C.

1912.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

LUNACY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., *Barrister-at-Law.*

ASSISTANT EDITOR—A. P. STONE, *Barrister-at-Law.*

REPORTERS.

Court of Appeal	G. A. STREETEN, H. C. ROPER,	*Barristers-at-Law.*
Mr. Justice Joyce AND Mr. Justice Eve	R. MORRISON, GEORGE MACAN, ARTHUR LAWRENCE,	*Barristers-at-Law.*
Mr. Justice Swinfen Eady AND Mr. Justice Neville	H. L. FRASER, G. R. ALSTON, J. R. BROOKE,	*Barristers-at-Law.*
Mr. Justice Warrington AND Mr. Justice Parker	FRANK EVANS, W. IVIMEY COOK, A. CORDERY,	*Barristers-at-Law.*

1912.—VOL. I.

LONDON:

Printed for the Council of Law Reporting

BY BRADBURY, AGNEW, & CO. LD., OF 10, BOUVERIE STREET, E.C.,

And Published

BY THE COUNCIL AT 10, OLD SQUARE, LINCOLN'S INN, W.C.

BIBL. LONDIN UNIV.

BIBL.
LONDIN.
UNIV.

Earl Loreburn	*Lord Chancellor.*
Lord Alverstone	*Lord Chief Justice of England.*
Sir H. H. Cozens-Hardy	*Master of the Rolls.*
Sir Roland Vaughan Williams Sir J. Fletcher Moulton Sir George Farwell Sir H. B. Buckley Sir W. R. Kennedy	*Lords Justices of the Court of Appeal.*
Sir Samuel T. Evans	*President of the Probate, Divorce, and Admiralty Division.*
Sir Matthew I. Joyce Sir C. Swinfen Eady Sir T. Rolls Warrington Sir R. Neville Sir R. J. Parker Sir H. T. Eve	*Justices of High Court attached to Chancery Division.*
Sir Rufus D. Isaacs	*Attorney-General.*
Sir J. A. Simon	*Solicitor-General.*

ERRATA.

Page	*Line*	*For*	*Read*
87	foot note (3).	[1990] 1 Ch.	[1909] 1 Ch.
198	15 from top.	Charles.	Thomas.
199	9 from bottom.	Thomas.	Charles.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1912, will be as follows :—

In the First Series,
[1912] 1 Ch. [1912] 2 Ch.

In the Second Series,
[1912] 1 K. B. [1912] 2 K. B. [1912] 3 K. B. [1912] P.

In the Third Series,
[1912] A. C.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Alexander, Hatzfeldt-Wildenburg (Von) *v.* – – –	284
Altamont *v.* Forsyth. *In re* Hodgson's Settled Estate –	784
Atkinson and Horsell's Contract, *In re*– – – – –	2
Attenborough, Solomon *v.* (C.A.)	451
Attorney-General, Bowles *v.* –	123
———, Burghes *v.* (C.A.)	173
——— *v.* Day. *In re* Cardwell – – – –	779
——— *v.* Dorin –	369
———, Dyson *v.* (C.A.)	158
——— *v.* Price (C.A.)	667
——— *v.* Watford Rural Council – – –	417

B.

	PAGE
Barwick *v.* Holt. *In re* Hobson	626
Beavan, *In re.* Davies, Banks & Co. *v.* Beavan – – –	196
———, Davies, Banks & Co. *v.* *In re* Beavan – – –	196
Birnstingl *v.* Birnstingl. *In re* Pyke – – – –	770
Bladon, *In re.* Dando *v.* Porter (C.A.)	45
Bowles *v.* Attorney-General –	123
Bradley, Staffordshire and Worcestershire Canal Navigation *v.*	91
Briggs, Tew *v.* *In re* Charlesworth's Trusts – – –	319
Bristol Guardians *v.* Bristol Waterworks Company – –	111
——— (C.A.)	846

PAGE

Bristol Waterworks Company, Bristol Guardians *v.* – – 111

——————————— –(C.A.) 846
Brooke *v.* Searle. *In re* Searle – 610
Burghes *v.* Attorney-General (C.A.) 173
Butler, Grosvenor *v.* *In re* Cavendish – – – – 794

C.

Canal (Staffordshire and Worcestershire) Navigation *v.* Bradley – – – – 91
Canal and Dock (Regent's) Company *v.* London County Council 583
Car (Law) and General Insurance Corporation, *In re* – – 405
Cardwell, *In re.* Attorney-General *v.* Day – – – 779
Carter, Pocock *v.* – – – 663
Cavendish, *In re.* Grosvenor *v.* Butler – – – – 794
Charlesworth's Trusts, *In re.* Tew *v.* Briggs – – – 319
Church of England Collegiate School of St. Peter, Clarke *v.* *In re* Da Costa – – – 337
Clarke *v.* Church of England Collegiate School of St. Peter. *In re* Da Costa – – – 337
Clay (Richard) & Sons, Ld., Griffith *v.* – – – – 291
Clifford, *In re.* Mallam *v.* McFie – – – – 29
Cockrell's Estate, *In re* –(C.A.) 23
Colliery (Newdigate), Ld., *In re.* Newdegate *v.* The Company (C.A.) 468
Corbould-Ellis *v.* Dales. *In re* Shields – – – – 591
Crosse, Webb *v.* – – – 323
Cuff *v.* London and County Land and Building Company (C.A.) 440
Cycle (Riley) Co., Pugh *v.* – 613

D.

Da Costa, *In re.* Clarke *v.* Church of England Collegiate School of St. Peter – – 337
Dales, Corbould-Ellis *v.* *In re* Shields – – – – 591
Dando *v.* Porter. *In re* Bladon– 45
Davies, Banks & Co. *v.* Beavan. *In re* Beavan – – – 196
Day, Attorney-General *v.* *In re* Cardwell – – – – 779
Deane (Edward) & Beal, Ld., Royal Warrant Holders' Association *v.* – – – – 10
Derby (Earl) and Fergusson's Contract, *In re* – – – 479
Dorin, Attorney-General *v.* – 369
Du Cros (W. & G.), Ld.'s Applications, *In re* – –(C.A.) 644
Duncannon (Viscount) *v.* Manchester (Duke of). *In re* Dowager Duchess of Manchester – – – – 540
Dyson *v.* Attorney-General (C.A.) 158

E.

Edward Deane & Beale, Ld., Royal Warrant Holders' Association *v.* – – – – 10
Egmont, Lefroy *v.* *In re* Earl of Egmont's Settled Estates – 251
Egmont's (Earl) Settled Estates, *In re.* Lefroy *v.* Egmont – 251
Ellis, Munday & Clarke, Rakusen *v.* – – –(C.A.) 831
Eustace, *In re.* Lee *v.* McMillan 561
Ewen *v.* Halston. *In re* Halston 435

F.

Fergusson and Derby's (Earl) Contract, *In re* – – – 479
Firth, *In re.* Firth *v.* Loveridge 806
——— *v.* Loveridge. *In re* Firth 806
Ford *v.* Ward. *In re* Mann – 388
Forsyth, Altamont *v.* *In re* Hodgson's Settled Estate – 784

G.

Gant *v.* Hobbs. *In re* Robinson's Settlement – –(C.A.) 717
Gardner *v.* Iredale – – 700

PAGE

Gas (Tewkesbury) Company, *In re.* Tysoe *v.* The Company –(C.A.) 1
Gas Light and Coke (Worthing) Company, Schweder *v.* – – 83
Great Central Railway Company *v.* Midland Railway Company (C.A.) 206
Greenwood, *In re.* Greenwood *v.* Sutcliffe – – – 392
———— *v.* Sutcliffe. *In re* Greenwood – – – – 392
Grey, Payne *v.* *In re* Earl of Stamford and Warrington (C.A.) 343
Griffith *v.* Richard Clay & Sons, Ld. – – – – – 291
Grosvenor *v.* Butler. *In re* Cavendish – – – – 794
Guarantee Trust and Accident (Law) Society *v.* Munich Reinsurance Company – – 138

H.

Halston, *In re.* Ewen *v.* Halston – – – – 435
———, Ewen *v.* *In re* Halston – – – – 435
Hatzfeldt-Wildenburg (Von) *v.* Alexander – – – – 284
Haygarth, *In re.* Wickham *v.* Holmes – – – – 510
Hemmings, Jarvis *v.* – – 462
Hobbs, Gant *v.* *In re* Robinson's Settlement – – (C.A.) 717
Hobson, *In re.* Barwick *v.* Holt 626
Hodgson's Settled Estate, *In re.* Altamont *v.* Forsyth – – 784
Holmes, Wickham *v.* *In re* Haygarth – – – – 510
Holt, Barwick *v.* *In re* Hobson 626
Home and Foreign Investment and Agency Company, *In re* – 72
Horsell and Atkinson's Contract, *In re* – – – – 2
Hoyles, *In re.* Row *v.* Jagg (No. 2) – – – – 67
Hume, *In re.* Public Trustee *v.* Mabey – – – – 693

I.

PAGE

Investment and Agency (Home and Foreign) Company, *In re* 72
Iredale, Gardner *v.* – – – 700

J.

Jagg, Row *v.* *In re* Hoyles (No. 2) – – – – 67
Jarvis *v.* Hemmings – – 462

K.

Kenyon *v.* Walford. *In re* Walford – – – (C.A.) 219
Kingston, Miller & Co., Ld. *v.* Thomas Kingston & Co., Ld.– 575
Kynoch, Ld. *v.* Rowlands (C.A.) 527

L.

Lancashire Plate Glass, Fire and Burglary Insurance Company, *In re* – – – – 35
Land and Building (London and County) Company, Cuff *v.* (C.A.) 440
Law Car and General Insurance Corporation, *In re* – – 405
Law Guarantee Trust and Accident Society *v.* Munich Reinsurance Company – – 138
Lawrence, Public Trustee *v.* – 789
Lee *v.* McMillan. *In re* Eustace 561
Leeming, *In re.* Turner *v.* Leeming – – – – 828
———, Turner *v.* *In re* Leeming – – – – – 828
Lefroy *v.* Egmont. *In re* Earl of Egmont's Settled Estates – 251
Lillington and Lloyds Bank's Contract, *In re* – – – 601
Linotype and Machinery, Ld., Printing and Machinery, Ld. *v.* 566
Lloyds Bank and Lillington's Contract, *In re* – – – 601
London and County Land and Building Company, Cuff *v.* (C.A.) 440

PAGE

London County Council, Regent's Canal and Dock Company *v.* – 583
Loveridge, Firth *v.* *In re* Firth 806

M.

Mabey, Public Trustee *v.* *In re* Hume – – – – 693
McFie, Mallam *v.* *In re* Clifford 29
McMillan, Lee *v.* *In re* Eustace 561
Macnally, Smith *v.* – – – 816
Mallam *v.* McFie. *In re* Clifford 29
Manchester (Dowager Duchess of), *In re.* Duncannon (Viscount) *v.* Manchester (Duke of) – 540
———— (Duke of), Duncannon (Viscount) *v.* *In re* Dowager Duchess of Manchester – – 540
Manks *v.* Whiteley – –(C.A.) 735
Mann, *In re.* Ford *v.* Ward – 388
Marshall, Worseley *v.* *In re* Salvin – – – – 332
Maryon-Wilson's Estate, *In re* (C.A.) 55
Metropolitan Water Board *v.* Phillips – – – – 296
Meyer, Nore *v.* *In re* Solomon – 261
Midland Railway Company, Great Central Railway Company *v.* (C.A.) 206
Mills *v.* United Counties Bank, Ld. – – – –(C.A.) 231
Morris, *In re* – – –(C.A.) 730
Munich Re-insurance Company, Law Guarantee Trust and Accident Society *v.* – – 138

N.

Newdegate *v.* Newdigate Colliery, Ld. *In re* The Company (C.A.) 468
Newdigate Colliery, Ld., *In re.* Newdegate *v.* The Company (C.A.) 468
Newdigate Colliery, Ld., Newdegate *v.* *In re* The Company (C.A.) 468
Nore *v.* Meyer. *In re* Solomon 261

PAGE

Nunburnholme (Lord), *In re.* Wilson *v.* Nunburnholme (C.A.) 489
————, Wilson *v.* *In re* Lord Nunburnholme–(C.A.) 489

O.

Owen, *In re.* Slater *v.* Owen – 519
——, Slater *v.* *In re* Owen – 519

P.

Payne *v.* Grey. *In re* Earl of Stamford and Warrington (C.A.) 343
Pearson *v.* Webster. *In re* Webster – – – – 106
Phillips, Metropolitan Water Board *v.* – – – – 296
Pink, *In re.* Pink *v.* Pink – 498
—— *v.* Pink. *In re* Pink – 498
Plate Glass, Fire and Burglary (Lancashire) Insurance Company, *In re* – – – 35
Pocock *v.* Carter – – – 663
Porter, Dando *v.* *In re* Bladon 45
Poultney, *In re.* Poultney *v.* Poultney – – – – 245
———— *v.* Poultney. *In re* Poultney – – – – 245
Price, Attorney-General *v.* (C.A.) 667
Printing Machinery Company, Ld. *v.* Linotype and Machinery, Ld. – – – – 566
Public Trustee *v.* Lawrence – 789
———— *v.* Mabey. *In re* Hume – – – – 693
Pugh *v.* Riley Cycle Company – 613
Pyke, *In re.* Birnstingl *v.* Birnstingl – – – – 770

R.

Rakusen *v.* Ellis, Munday & Clarke – – –(C.A.) 831
Regent's Canal and Dock Company *v.* London County Council – – – – – 583

PAGE

Re-insurance (Munich) Company, Law Guarantee Trust and Accident Society *v.* – – 138
Richard Clay & Sons, Ld., Griffith *v.* – – – – 291
Richards, *In re* – – – 49
Riley Cycle Company, Pugh *v.* – 613
River Wear Commissioners, Sunderland Orphan Asylum *v.* – 191
Robinson's Settlement, *In re.* Gant *v.* Hobbs – –(C.A.) 717
Row *v.* Jagg. *In re* Hoyles (No. 2) – – – – 67
Rowlands, Kynoch, Ld. *v.* (C.A.) 527
Royal Warrant Holders' Association *v.* Edward Deane & Beal, Ld. – – – – 10

S.

Salvin, *In re.* Worseley *v.* Marshall – – – – – 332
Schweder *v.* Worthing Gas Light and Coke Company – – 83
Searle, *In re.* Brooke *v.* Searle 610
———, Brooke *v.* *In re* Searle 610
Shields, *In re.* Corbould-Ellis *v.* Dales – – – – 591
Slater *v.* Owen. *In re* Owen – 519
Smith *v.* Macnally – – – 816
Solomon, *In re.* Nore *v.* Meyer 261
——— *v.* Attenborough–(C.A.) 451
Spottiswoode, Dixon & Hunting, Ld., *In re* – – – 410
Staffordshire and Worcestershire Canal Navigation *v.* Bradley – 91
Stamford and Warrington (Earl), *In re.* Payne *v.* Grey –(C.A.) 343
Sunderland Orphan Asylum *v.* River Wear Commissioners – 191
Sutcliffe, Greenwood *v.* *In re* Greenwood – – – – 392

T.

Taylor's Patent, *In re* – – 635
Tew *v.* Briggs. *In re* Charlesworth's Trusts – – – 319

PAGE

Tewkesbury Gas Company, *In re.* Tysoe *v.* The Company (C.A.) 1
———, Tysoe *v.* *In re* Tewkesbury Gas Company – – –(C.A.) 1
Thomas Kingston & Co., Ld., Kingston, Miller & Co., Ld. *v.* 575
Turner *v.* Leeming. *In re* Leeming – – – – – 828
Tysoe *v.* Tewkesbury Gas Company. *In re* Tewkesbury Gas Company – – –(C.A.) 1

U.

United Counties Bank, Ld., Mills *v.* – – – – 231

V

Van der Leeuw's Trade Mark, *In re* – – – – – 40
Von Hatzfeldt-Wildenburg *v.* Alexander – – – – 284

W.

W. & G. Du Cros, Ld.'s Applications, *In re*– – –(C.A.) 644
Walford, *In re.* Kenyon *v.* Walford – – –(C.A.) 219
———, Kenyon *v.* *In re* Walford – – – –(C.A.) 219
Ward, Ford *v.* *In re* Mann – 388
Warrant Holders' (Royal) Association *v.* Edward Deane & Beal, Ld. – – – – 10
Water (Metropolitan) Board *v.* Phillips – – – – 296
Waterworks (Bristol) Company, Bristol Guardians *v.* – – 111
Watford Rural Council, Attorney-General *v* – – – – 417
Webb *v.* Crosse – – – 323

	PAGE
Webster, *In re.* Pearson *v.* Webster – – – –	106
———, Pearson *v.* *In re* Webster – – – –	106
Whiteley, Manks *v* – –(C.A.)	735
Wickham *v.* Holmes. *In re* Haygarth – – – –	510
Williams, *In re.* Williams *v.* Williams – – – –	399
Williams *v.* Williams. *In re* Williams – – – –	399
Wilson *v.* Nunburnholme. *In re* Lord Nunburnholme (C.A.)	489
Worseley *v.* Marshall. *In re* Salvin – – – –	332
Worthing Gas Light and Coke Company, Schweder *v.* – –	83

TABLE OF CASES CITED.

A.

		PAGE
Adair *v.* Carden	29 L. R. Ir. 469	235
Adams *v.* Adams	[1892] 1 Ch. 369	399
——— *v.* Angell	5 Ch. D. 634	740
Atkins, In re	98 L. T. 667	388
Aerators, Ld. *v.* Tollitt	[1902] 2 Ch. 319	577
Airdrie, Coatbridge and District Water Trustees *v.* Flanagan	43 S. L. R. 422	111, 850
Albert Baker & Co.'s Application, In re	[1908] 2 Ch. 86	646
Alison's Case	L. R. 15 Eq. 394; 9 Ch. 1	77
Allen, In re	[1905] 2 Ch. 400	340
——— *v.* Embleton	4 Drew. 226	520
Alt *v.* Gregory	8 D. M. & G. 221	628
Andress's Case	8 Ch. D. 126	710
Anthony *v.* Rees	2 Cr. & J. 83	351
Applebee, In re	[1891] 3 Ch. 422	501
Armstrong *v.* Eldridge	3 Bro. C. C. 215	628
Arnold *v.* Arnold	2 My. & Cr. 256	544
Ashbury Railway Carriage and Iron Company *v.* Riche	L. R. 7 H. L. 653	77, 854
Ashby *v.* Jenner	32 Sol. J. 576	235
Ashforth, In re	[1905] 1 Ch. 535	341, 366
Ashton Gas Company *v.* Attorney-General	[1906] A. C. 10	127
Aston *v.* Pye	5 Ves. 350	510
Attorney-General *v.* Antrobus	[1905] 2 Ch. 188	423
——— *v.* Boultbee	2 Ves. Jun. 380	673
——— *v.* Bruce	[1901] 2 K. B. 391	254
——— *v.* Campbell	L. R. 5 H. L. 524	545
——— *v.* Edalji	97 L. T. 292; [1907] W. N. 174	674
——— *v.* Gibb	[1909] 2 Ch. 265	375
——— *v.* Great Eastern Railway Company	5 App. Cas. 473	117
——— *v.* Guise	2 Vern. 266	674
——— *v.* London Corporation	2 Mac. & G. 247	781
——— *v.* Mansfield (Earl)	2 Russ. 501	675
——— *v.* Mersey Railway Company	[1907] A. C. 415	852
——— *v.* Napier	6 Ex. 217	546
——— *v.* Rufford & Co., Ld.	[1899] 1 Ch. 537	375
——— *v.* Shadwell	[1910] 1 Ch. 92	674
——— *v.* Sherborne Grammar School (Governors)	18 Beav. 256	675
——— *v.* Stewart	L. R. 14 Eq. 17	673, 780

B.

Bacon *v.* Proctor	T. & R. 31	349
Badcock *v.* Hunt	22 Q. B. D. 145	305

		PAGE
Badrick *v.* Stevens	3 Bro. C. C. 43	222
Baglan Hall Colliery Company, In re	L. R. 5 Ch. 346	710
Bailey *v.* Birchall	2 H. & M. 371	25
Bainbridge *v.* Smith	41 Ch. D. 462	448
Baker and Selmon's Contract, In re	[1907] 1 Ch. 238	6
——— *v.* Greenhill	3 Q. B. 148	786
Bank of Hindustan, China and Japan *v.* Alison	L. R. 6 C. P. 54, 222	77
Barran *v.* Lomas	28 W. R. 973	617
Bateman *v.* Hotchkin	10 Beav. 426	349
Batten *v.* Wedgwood Coal and Iron Company	28 Ch. D. 317	25
Battersea Vestry *v.* County of London and Brush Provincial Electric Lighting Company	[1899] 1 Ch. 474	87
Battison *v.* Hobson	[1896] 2 Ch. 403	740
Bayer *v.* Symington	25 Rep. Pat. Cas. 56	616
Bayer's Design, In re	24 Rep. Pat. Cas. 65; 25 Rep. Pat. Cas. 56	616
Bedingfield and Herring's Contract, In re	[1893] 2 Ch. 332	721
Beer *v.* Ward	Jac. 77	833
Begbie *v.* Phosphate Sewage Company	L. R. 10 Q. B. 191	725
Bellamy *v.* Debenham	45 Ch. D. 481; [1891] 1 Ch. 412	286
Benham *v.* Gray	5 C. B. 138	665
Berry *v.* Gaukroger	[1903] 2 Ch. 116	319
Biggs *v.* Head	Sau. & Sc. 335	834
Birmingham Small Arms Company *v.* Webb & Co.	24 Rep. Pat. Cas. 27	650
Birmingham Small Arms Company's Application, In re	[1907] 2 Ch. 396	650
Blachford, In re	27 Ch. D. 676	222
Black & Co.'s Case	L. R. 8 Ch. 254	405
Blackheath (The Hundred of), In re	1 Salk. 362	786
Blackman, In re	16 Beav. 377	437
Blackwood *v.* Reg.	8 App. Cas. 82	545
Blair *v.* Duncan	[1902] A. C. 37	337
Blake *v.* Gale	32 Ch. D. 571	561
Blakesley and Beswick, In re	32 Beav. 379	53
Blunt's Trusts, In re	[1904] 2 Ch. 767	340
Blyth *v.* Fladgate	[1891] 1 Ch. 337	267
Boake (A.), Roberts & Co. *v.* W. A. Wayland & Co.	26 Rep. Pat. Cas. 251	650
Bonnard *v.* Dott	[1906] 1 Ch. 740	723
Bonnin *v.* Neame	[1910] 1 Ch. 732	570
Booth *v.* Leycester	3 My. & Cr. 459	334
Bourne *v.* Swan & Edgar, Ld.	[1903] 1 Ch. 211	11
Bouverie *v.* Bouverie	2 Ph. 349	247
Bowen, In re	[1893] 2 Ch. 491	340
Bradford Corporation *v.* Pickles	[1894] 1 Ch. 145; [1895] A. C. 587	86
Brett *v.* Clowser	5 C. P. D. 376	98
Bricheno *v.* Thorp	Jac. 300	833
Bridge *v.* Abbott	3 Bro. C. C. 224	397
Bridgeman *v.* Daw	40 W R. 253	235
Briggs *v.* Oxford (Earl)	1 D. M. & G. 363	349
Brigstocke *v.* Brigstocke	8 Ch. D. 357	773
Bristol (Marquis), In re	[1897] 1 Ch. 946	794

		PAGE
Bristol, Cardiff and Swansea Aerated Bread Co. *v.* Maggs	44 Ch. D. 616	286
Brown *v.* Symons	8 C. B. (N.S.) 208	612
Browne *v.* Stoughton	14 Sim. 369	347
Brownjohn *v.* Gale	[1869] W. N. 133	108
Bryan *v.* Twigg	L. R. 3 Ch. 183	628
Bryant and Barningham's Contract, In re	44 Ch. D. 218	4
Buckton, In re	[1907] 2 Ch. 406	435, 780
Bull *v.* Pritchard	1 Russ. 213	697
Burdon *v.* Barkus	3 Giff. 412; 4 D. F. & J. 42	665
Burghes *v.* Attorney-General	[1911] 2 Ch. 139; [1912] 1 Ch. 173	160, 161
Burkinshaw *v.* Nicolls	3 App. Cas. 1004	76
Burrell *v.* Egremont (Earl)	7 Beav. 205	741
Burroughs, Lynn and Sexton, In re	5 Ch. D. 601	6
Burt, Boulton & Hayward *v.* Bull	[1895] 1 Q. B. 276	470

C.

Caballero *v.* Henty	L. R. 9 Ch. 447	483
Caledonian Railway Company *v.* Glasgow Corporation	3 F. 526	83
California Fig Syrup Company, In re	[1910] 1 Ch. 130	646
Campden Charities, In re	18 Ch. D. 310	673
Cannon Brewery *v.* Nash	77 L. T. 648	612
Capital and Counties Bank *v.* Rhodes	[1903] 1 Ch. 631	740
Cardwell *v.* Lucas	2 M. & W. 111	194
Carlisle, In re	44 Ch. D. 200	571
Carthew, In re	27 Ch. D. 485	52
Case *v.* Drosier	2 Keen, 764; 5 My. & Cr. 240	349
Catlin, In re	18 Beav. 508	52
Cellular Clothing Company *v.* Maxton & Murray	[1899] A. C. 326	650
Chandler *v.* Bradley	[1897] 1 Ch. 315	774
Chapman *v.* Michaelson	[1909] 1 Ch. 238	723
——— *v.* Salt	2 Vern. 646	591
Chapman's Case	[1895] 1 Ch. 771	708
Cherry *v.* Boultbee	4 My. & Cr. 442	498
Chester Waterworks Company *v.* Chester Union	98 L. T. 701	113, 849
Chesterfield (Earl) *v.* Harris	[1908] 2 Ch. 397; [1911] A. C. 623	91
Chesterfield's (Earl) Trusts, In re	24 Ch. D. 643	523
Chipperfield *v.* Carter	72 L. T. 487	288
Chisholm, In re	[1902] 1 Ch. 457	321
Cholmondeley (Earl) *v.* Clinton (Lord)	19 Ves. 261; Coop. G. 80	833
Christ's Hospital Trustees *v.* Grainger	1 Mac. & G. 460	340
Clark *v.* Adie	2 App. Cas. 423	98
Clarke, In re	97 L. T. 707	437
Clay, In re	[1885] W. N. 22; 54 L. J. (Ch.) 648	394
Clifford, In re	[1912] 1 Ch. 29	830
Clunies-Ross, In re	[1912] W. N. 33	392
Cobbold, In re	[1903] 2 Ch. 299	249
Cochrane *v.* Cochrane	11 L. R. Ir. 361	352
Coldwell *v.* Holme	2 Sm. & Giff. 31	437

		PAGE
Coleman and Jarrom, In re	4 Ch. D. 165	395
Colley's Patents, Ld. *v.* Metropolitan Water Board	[1912] A. C. 24	848
Colls *v.* Home and Colonial Stores	[1904] A. C. 179	293
Colonial Insurance Company of New Zealand *v.* Adelaide Insurance Company	12 App. Cas. 128	148
Colquhoun *v.* Brooks	14 App. Cas. 493	545
Cooke *v.* New River Company	38 Ch. D. 56; 14 App. Cas. 698	113, 116, 849
Cooper, In re	27 Ch. D. 565	721
——— *v.* Symington	10 Rep. Pat. Cas. 264	618
Cowley (Lord) *v.* Byas	5 Ch. D. 944	375
Creswell *v.* Davidson	56 L. T. 811	601
Creuze *v.* Hunter	2 Ves. Jun. 157	334
Cripps *v.* Wolcott	4 Madd. 11	246
Crisp *v.* Holden	54 Sol. J. 784	822
Crosbie-Hill *v.* Sayer	[1908] 1 Ch. 866	740
Crosfield (Joseph) & Sons, Ld., In re	[1910] 1 Ch. 130	646
Cross *v.* Sprigg	6 Hare, 552	502
Crossley *v.* Maycock	L. R. 18 Eq. 180	287
Crozier *v.* Fisher	4 Russ. 398	250

D.

Dane *v.* Mortgage Insurance Corporation	[1894] 1 Q. B. 54	147
Daniel's Settlement Trusts, In re	1 Ch. D. 375	697
Darlington *v.* Hamilton	Kay, 550	601
Daventry Rural Council *v.* Parker	[1900] 1 Q. B. 1	787
Davies to Jones	24 Ch. D. 190	351
——— *v.* Clough	8 Sim. 262	833
——— *v.* Edwards	7 Ex. 22	204
——— *v.* Stephens	7 C. & P. 570	422
Dean *v.* Dean	[1891] 3 Ch. 150	348
Deering *v.* Winchelsea (Lord)	2 Bos. & P. 270	242
Devonport Corporation *v.* Tozer	[1903] 1 Ch. 759	369
Dive, In re	[1909] 1 Ch. 328	267
Dodson *v.* Downey	[1901] 2 Ch. 620	235
Doe *v.* Baytup	3 Ad. & E. 188	98
—— *v.* Bluck	8 C. & P. 464	665
—— *v.* Green	9 Ad. & E. 658	612
—— *v.* Miles	1 Stark. 181	665
—— *v.* Smythe	4 M. & S. 347	98
Dooley *v.* Mahon	I. R. 11 Eq. 299	437
Douglas, In re	Unreported	547
Douglas-Menzies *v.* Umphelby	[1908] A. C. 224	546
Dover, Ld. *v.* Nürnberger Celluloidwaren Fabrik Gebrüder Wolff	27 Rep. Pat. Cas. 498	617
Dyson *v.* Attorney-General	[1912] 1 Ch. 158	174
——— *v.* ———	[1911] 1 K. B. 410	158, 179

E.

Earle *v.* Bellingham (No. 2)	24 Beav. 448; 27 L. J. (Ch.) 545; 3 Jur. (N.S.) 1237	220, 224
Eastman Photographic Materials Company *v.* Comptroller-General	[1898] A. C. 571	658

		PAGE
Ecclesiastical Commissioners for England *v.* Kino	14 Ch. D. 213	293
Ecroyd *v.* Coulthard	[1897] 2 Ch. 554; [1898] 2 Ch. 358	96
Eddystone Marine Insurance Company, In re	[1892] 2 Ch. 423	148
———	[1893] 3 Ch. 9	707
Eden *v.* Smyth	5 Ves. 341	502
Edgar *v.* Special Commissioners for English Fisheries	23 L. T. 732	97
Edwards *v.* Edwards	15 Beav. 357; 21 L. J. (Ch.) 324	248
——— *v.* Janes	1 K. & J. 534	203
Egg *v.* Blayney	21 Q. B. D. 107	786
Egmont's (Earl) Trusts, In re	[1908] 1 Ch. 821	254
Ely, In re	65 L. T. 452	435
Emmett, In re	95 L. T. 755	196
Eno *v.* Dunn	15 App. Cas. 252	41, 651
Evans *v.* Judkins	4 Camp. 156	325
Ewin, In re	1 Cr. & J. 151	544

F.

Farbenfabriken Application, In re	[1894] 1 Ch. 645	651
Farquhar *v.* Newbury Rural Council	[1908] 2 Ch. 586	423
Feiling's and Rimington's Case	L. R. 2 Ch. 714	77
Fellowes *v.* Sedgley Urban Council	70 J. P. 412	375
Ferrand *v.* Wilson	4 Hare, 344	349
Fildes *v.* Hooker	3 Madd. 193	605
Fine Cotton Spinners and Doublers Association *v.* Harwood Cash & Co.	[1907] 2 Ch. 184	575
Finlay *v.* Mexican Investment Corporation	[1897] 1 Q. B. 517	147
Fisher *v.* Jackson	[1891] 2 Ch. 84	821
Flower *v.* Marten	2 My. & Cr. 459	502
Floyer *v.* Bankes	3 D. J. & S. 306	259
——— *v.* ———	L. R. 8 Eq. 115	349
Foley's Charity Trustees *v.* Dudley Corporation	[1910] 1 K. B. 317	87
Forbes *v.* Moffatt	18 Ves. 384	741
Forster *v.* Nixon's Navigation Company	23 Times L. R. 138	471
Fowkes *v.* Pascoe	L. R. 10 Ch. 343	591
Fox *v.* Fox	L. R. 19 Eq. 286	492, 693
Francis, In re	74 L. J. (Ch.) 198	773
Frederick *v.* Bognor Water Company	[1909] 1 Ch. 149	113
Frewen *v.* Law Life Assurance Society	[1896] 2 Ch. 511	255
Fry *v.* Tapson	28 Ch. D. 268	266
Fuller *v.* Redman	26 Beav. 614	204
Furniss *v.* Midland Railway Company	L. R. 6 Eq. 473	586

G.

Games *v.* Bonnor	33 W. R. 64; 54 L. J. (Ch.) 517	2
Gardner *v.* Ingram	61 L. T. 729	612

		PAGE
Gibson, In re	L. R. 2 Eq. 669	29, 830
Gifford (Lord) *v.* Fitzhardinge (Lord)	[1899] 2 Ch. 32	740
Gilbert *v.* Wetherell	2 S. & S. 254	501
Gillins, In re	[1909] 1 Ch. 345	29
Gillow *v.* Durham County Council	[1911] 2 K. B. 1074	821
Glasgow (Lord Provost of) *v.* Glasgow and South Western Railway Company	[1895] A. C. 376	87
Glasgow College *v.* Attorney-General	1 H. L. C. 800	673
Godwin *v.* Culley	4 H. & N. 373	204
Gokuldoss Gopaldoss *v.* Rambux Seochand	L. R. 11 Ind. App. 126	741
Goodfellow *v.* Burchett	2 Vern. 298	594
Goodlad *v.* Burnett	1 K. & J. 341	29
Goodson *v.* Richardson	L. R. 9 Ch. 221	86
Gordon *v.* Campbell	1 Bell, App. 428	721
Grafton *v.* Watson	51 L. T. 141	617
Grainger, In re	[1900] 2 Ch. 756	222
Gramophone Company *v.* Magazine Holder Company	27 Rep. Pat. Cas. 152	617
Grand Union Canal Company *v.* Ashby	6 H. & N. 394	96
Grant, Bulcraig & Co., In re	[1906] 1 Ch. 124	52
Gray, In re	36 Ch. D. 205	32, 830
Great North-West Central Railway Company *v.* Charlebois	[1899] A. C. 114	77
Greenwood *v.* Greenwood	5 Ch. D. 954	697
——— *v.* Sutcliffe	[1892] 1 Ch. 1	325
Greet *v.* Greet	5 Beav. 123	492
Gregory *v.* Piper	9 B. & C. 591	530
Grenfell *v.* Girdlestone	2 Y. & C. Ex. 662	204
Gresley's Settlement, In re	[1911] 1 Ch. 358	392
Greville *v.* Browne	7 H. L. C. 689	221
Grice *v.* Shaw	10 Hare, 76	741
Griffin, In re	[1899] 1 Ch. 408	503
Grimond *v.* Grimond	[1905] A. C. 124	337
Grosvenor (Lord) *v.* Hampstead Junction Railway Company	1 De G. & J. 446	587
Grove *v.* Portal	[1902] 1 Ch. 727	98
Gyles, In re	[1907] 1 I. R. 65	220

H.

Hacket, In re	[1907] 1 Ch. 385	321
Hadley *v.* Baxendale	9 Ex. 341	294
Hall *v.* Hill	1 D. & War. 94	591
Hanbury *v.* Jenkins	[1901] 2 Ch. 401	96
Harris *v.* Lee	1 P. Wms. 482	198
Harvey *v.* Barnard's Inn (Principal and Ancients of)	50 L. J. (Ch.) 750	287
Hatschek's Patents, In re	[1909] 2 Ch. 68; 26 Rep. Pat. Cas. 228	639
Hayford *v.* Criddle	22 Beav. 477	605
Heasman *v.* Pearse	L. R. 7 Ch. 275	511
Heath *v.* Perry	3 Atk. 101	222
Heaton's Trade Mark, In re	27 Ch. D. 570	41
Hecla Foundry Company *v.* Walker, Hunter & Co.	14 App. Cas. 550	617

		PAGE
Henderson's Nigel, Ld., In re	[1911] W. N. 59	412
Hendon Local Board *v.* Pounce	42 Ch. D. 602	377
Higginbottom, In re	[1892] 3 Ch. 132	811
Higgins, In re	29 Ch. D. 697; 31 Ch. D. 142	259
Hiscoe, In re	71 L. J. (Ch.) 347	334
Hobbs *v.* London and South Western Railway Company	L. R. 10 Q. B. 111	294
Hodge, Ex parte	26 L. J. (Bank.) 77	350
——— *v.* Attorney-General	3 Y. & C. Ex. 342	181
Hodgson, In re	9 Ch. D. 673	502
——— *v.* Dean	2 S. & S. 221	743
Holdsworth *v.* M'Crea	L. R. 2 H. L. 380	617
Hollis' Hospital (Trustees of) and Hague's Contract, In re	[1899] 2 Ch. 540	337
Honeyman *v.* Marryat	21 Beav. 14	287
Hope Johnstone's Settlement Trusts, In re	25 Times L. R. 369	809
Hotchkys, In re	32 Ch. D. 408	255
Howcutt *v.* Bonser	3 Ex. 491	204
Howden (Lord), In the Goods of	43 L. J. (P. & M.) 26	544
Howe *v.* Dartmouth (Earl)	7 Ves. 137a	69
Howe's (Earl) Settled Estates, In re	[1903] 2 Ch. 69	254
Howgrave *v.* Cartier	3 V. & B. 79	247
Hoyles, In re	[1910] 2 Ch. 333; [1911] 1 Ch. 179	68
Hudson *v.* Buck	7 Ch. D. 683	287
Hunt, In re	62 L. T. 753	697
Hunter *v.* Attorney-General	[1899] A. C. 309	781
Husey *v.* London Electric Supply Association	[1902] 1 Ch. 411	470
Hussey *v.* Horne-Payne	8 Ch. D. 670; 4 App. Cas. 311	286, 288
Hutchins *v.* Hutchins	1 Hog. 315	834
Hyslop, In re	[1894] 3 Ch. 522	503

I.

Imperial and Grand Hotels Company *v.* Christchurch Guardians	[1905] 1 K. B. 89; [1905] 2 K. B. 239	306
Ingle *v.* Vaughan Jenkins	[1900] 2 Ch. 368	741
Ingram *v.* Suckling	7 W. R. 386	492
International Tea Stores Company *v.* Hobbs	[1903] 2 Ch. 165	98
Ironmongers' Company *v.* Attorney-General	10 Cl. & F. 908	675

J.

Jackson *v.* Dover	2 H. & M. 209	247
Jacobs *v.* Revell	[1900] 2 Ch. 858	5
James *v.* Lichfield	L. R. 9 Eq. 51	484
——— *v.* Rumsey	11 Ch. D. 398	325
Jeffery's Trusts, In re	L. R. 2 Eq. 68	223
Jenkins *v.* Briant	16 Sim. 272	334
Jenner *v.* Morris	3 D. F. & J. 45	198
Johnson *v.* Johnson	3 Hare, 157	395
——— *v.* Marriott	2 Cr. & M. 183	833

		PAGE
Jones, In re	2 Ch. D. 70	325
—— *v.* Chapman	2 Ex. 803	534
—— *v.* Daniel	[1894] 2 Ch. 332	287
—— *v.* Randall	1 Jac. & W. 100	628
—— *v.* Williams	2 M. & W. 326	530
Jones, Lloyd & Co., In re	41 Ch. D. 159	407
Joseph Crosfield & Sons, Ld., In re	[1910] 1 Ch. 130	646
Joy, In re	60 L. T. 175	107

K.

Kensington (Baron), In re	[1902] 1 Ch. 203	255
Kettlewell *v.* Watson	26 Ch. D. 501	738
Kinahan *v.* Bolton	15 Ir. Ch. Rep. 75	652
King *v.* Smith	6 Hare, 473	324
Kirk *v.* Eddowes	3 Hare, 509	591
Knatchbull's Settled Estate, In re	29 Ch. D. 588	786

L.

Lacon's Settlement, In re	[1911] 2 Ch. 17	771
Lade *v.* Holford	3 Burr. 1416; Amb. 479; 1 W. Bl. 428	351
Lainson *v.* Lainson (No. 2)	18 Beav. 7	332
Lane, In re	14 Ch. D. 856	32
Lanfranchi *v.* Mackenzie	L. R. 4 Eq. 421	294
Langton *v.* Carleton	L. R. 9 Ex. 57	612
Lanphier *v.* Buck	34 L. J. (Ch.) 650	515
Lantsbery *v.* Collier	2 K. & J. 709	349
Leahy *v.* De Moleyns	[1896] 1 I. R. 206	561
Leake *v.* Robinson	2 Mer. 363	491
Learoyd *v.* Whiteley	12 App. Cas. 727	267
Leeds Estate, Building and Investment Company *v.* Shepherd	36 Ch. D. 787	448
Leveridge, In re	[1901] 2 Ch. 830	131
Lewes, In re	1 Mac. & G. 23	325
Liquidation Estates Purchase Company *v.* Willoughby	[1898] A. C. 321; [1896] 1 Ch. 735	739, 763
Liskeard Union *v.* Liskeard Waterworks Company	7 Q. B. D. 505	113, 849
Little *v.* Kingswood Collieries Company	20 Ch. D. 733; 47 L. T. 323	831
Littledale *v.* Liverpool College	[1900] 1 Ch. 19	530
Lloyd *v.* Nowell	[1895] 2 Ch. 744	287
—— *v.* Williams	2 Atk. 108	222
London Chartered Bank of Australia, In re.	[1893] 3 Ch. 540	147
London County Council *v.* Attorney-General	[1902] A. C. 165	854
London Pressed Hinge Company, In re	[1905] 1 Ch. 576	470
London, Tilbury and Southend Railway Company and Gower's Walk Schools, In re	24 Q. B. D. 326	294
Long Eaton Recreation Grounds Company *v.* Midland Railway Company	[1902] 2 K. B. 574	586
Lonsdale (Earl) *v.* Berchtoldt (Countess)	3 K. & J. 185	523
Lord *v.* Lord	L. R. 2 Ch. 782	220

		PAGE
Lord Advocate *v.* Douglas's Executors	Unreported	547
Love *v.* L'Estrange	5 Bro. P. C. 59	492
Ludlam, In re	63 L. T. 330	222
Lyon *v.* Johnson	40 Ch. D. 579	571

M.

M'Crea *v.* Holdsworth	L. R. 6 Ch. 418	617
Macduff, In re	[1896] 2 Ch. 451	781
McGlennon's Application, In re	25 Rep. Pat. Cas. 797	40
McLeod *v.* Power	[1898] 2 Ch. 295	724
McNair *v.* Baker	[1904] 1 K. B. 208	114, 851
Manchester Brewery Company *v.* Coombs	[1901] 2 Ch. 608	194
Mann, In re	[1903] 1 Ch. 232	108
Manning *v.* Burges	1 Ch. Cas. 29	323
Manser, In re	[1905] 1 Ch. 68	780
Mansfield (Earl) *v.* Ogle	4 De G. & J. 38; 5 Jur. (N.S.) 419; 7 D. M. & G. 181	332, 333, 335
Maritime Bank of Canada (Liquidators of) *v.* Receiver-General of New Brunswick	[1892] A. C. 437	57
Marriott *v.* East Grinstead Gas and Water Company	72 J. P. 509; [1909] 1 Ch. 70	87
Marshall *v.* Holloway	2 Swans. 432	349
——— *v.* Taylor	[1895] 1 Ch. 641	530
Martelli *v.* Holloway	L. R. 7 H. L. 532	365
Martin *v.* Goble	1 Camp. 320	293
Martyn *v.* Blake	3 D. & War. 125	333
Maryon-Wilson, In re	[1900] 1 Ch. 565	554
Mege and Angier's Case	[1875] W. N. 208	710
Metropolitan Water Board *v.* Colley's Patents	[1911] 2 K. B. 38; [1911] W. N. 211; [1912] A. C. 24	113
——— *v.* New River Company	20 Times L. R. 687	850
Midland Railway Company *v.* Great Western Railway Company	L. R. 8 Ch. 841	207
——— *v.* Wright	[1901] 1 Ch. 738	530
Midleton (Lord) *v.* Eliot	15 Sim. 531	324
Miller *v.* Salomons	21 L. J. (Ex.) 161	115, 850
Miller's Dale and Ashwood Dale Lime Company, In re	31 Ch. D. 211	76
Millington *v.* Fox	3 My. & Cr. 338	651
Mills *v.* Farmer	19 Ves. 483	673
Mitchell *v.* Armstrong	17 Times L. R. 495	774
——— *v.* Henry	15 Ch. D. 181	618
Molyneux *v.* Hawtrey	[1903] 2 K. B. 487	484
Monmouthshire Canal and Railway Company *v.* Hill	4 H. & N. 421	98
Montague *v.* Montague	15 Beav. 565	801
Moody *v.* Tree	9 Rep. Pat. Cas. 333	617
Moore *v.* Hall	3 Q. B. D. 178	293
Morecock *v.* Dickins	Amb. 678	743
Morgan, In re	18 Ch. D. 93	461
Morley *v.* Bridges	2 Coll. 621	325
Morrice *v.* Aylmer	L. R. 7 H. L. 717	76

		PAGE
Morris *v.* Dimes	1 Ad. & E. 654	97
Mortimer, In re	[1905] 2 Ch. 502	365
Moses, In re	[1908] 2 Ch. 235	68
Motley *v.* Downman	3 My. & Cr. 1	651
Muir *v.* City of Glasgow Bank	4 App. Cas. 337	721
Murray, In the Goods of	[1896] P. 65	544

N.

Nash, In re	[1910] 1 Ch. 1	366
National Provincial Bank of England and Marsh, In re	[1895] 1 Ch. 190	606
Nelson *v.* Empress Assurance Corporation	[1905] 2 K. B. 281	148
New River Company *v.* Mather	L. R. 10 C. P. 442	306
Newbold *v.* Roadknight	1 Russ. & My. 677	222
Newton *v.* Birmingham Small Arms Company	[1906] 2 Ch. 378	448
Nisbet and Potts' Contract, In re	[1905] 1 Ch. 391; [1906] 1 Ch. 386	5, 738
Noble *v.* Cass	2 Sim. 343	773
North, In re	76 L. T. 186	800
—— *v.* Percival	[1898] 2 Ch. 128	284
North Cheshire and Manchester Brewery Company *v.* Manchester Brewery Company	[1899] A. C. 83	14
Norton *v.* Cooper	3 Sm. & Giff. 375	834
—— *v.* London and North Western Railway Company	13 Ch. D. 268	530

O.

Ofner, In re	[1909] 1 Ch. 60	435
Olive, In re	34 Ch. D. 70	266
O'Mahoney *v.* Burdett	L. R. 7 H. L. 388	248
Ommaney, Ex parte	10 Sim. 298	324
Ooregum Gold Mining Company of India *v.* Roper	[1892] A. C. 125	709
Orpen, In re	16 Ch. D. 202	502
Otter *v.* Vaux (Lord)	2 K. & J. 650; 6 D. M. & G. 638	739

P.

Page *v.* Leapingwell	18 Ves. 463	223
Pagin and Gill's Case	6 Ch. D. 681	710
Palin *v.* Hills	1 My. & K. 470	394
Palmer *v.* Emerson	[1911] 1 Ch. 758	267
Paris *v.* Lymington Rural Council	75 J. P. (Journ.) 88	424
Parker-Jervis, In re	[1898] 2 Ch. 642	259
Parratt *v.* Parratt	2 De G. & Sm. 258	833
Parrish *v.* Hackney Borough Council	28 Times L. R. 110	306
Parsons *v.* Parsons	1 Ves. Jun. 266	437
Partington, In re	57 L. T. 654	266
—— *v.* Attorney-General	L. R. 4 H. L. 100	171
Payne *v.* Esdaile	13 App. Cas. 613	786

		PAGE
Peace *v.* Hains	11 Hare, 151	502
Pearce *v.* Edmeades	3 Y. & C. Ex. 246	628
Pearks *v.* Moseley	5 App. Cas. 714	347, 515
Pearson *v.* Dolman	L. R. 3 Eq. 315	492
Peel, In re	81 L. T. 504	437
Pellatt's Case	L. R. 2 Ch. 527	706
Penny *v.* Commissioner of Railways	[1900] A. C. 628	246
Perkins, In re	67 L. T. 743; 41 W. R. 170	794
Phillips *v.* Gutteridge	4 De G. & J. 531	740
——— *v.* Miller	L. R. 9 C. P. 196	484
Picken *v.* Matthews	10 Ch. D. 264	697
Pinchin *v.* London and Blackwall Railway Company	5 D. M. & G. 851	587
Powell *v.* Morgan	2 Vern. 90	399
Powell's Trust, In re	10 Hare, 134	334
Powell Duffryn Steam Coal Company *v.* Taff Vale Railway Company	L. R. 9 Ch. 331	217
Pyle Works, In re	44 Ch. D. 534	407

Q.

Queen Anne Residential Mansions and Hotel Company *v.* Westminster Corporation	46 Sol. J. 70	114, 851
Quicke's Trusts, In re	[1908] 1 Ch. 887	46

R.

Radcliffe, In re	22 Beav. 201	325
Rains *v.* Buxton	14 Ch. D. 537	530
Randell, In re	38 Ch. D. 213	340
Ravensworth, In re	[1905] 2 Ch. 1	223
Rawlinson *v.* Moss	30 L. J. (Ch.) 797	833
Ray *v.* Hazeldine	[1904] 2 Ch. 17	95
Redfern, In re	6 Ch. D. 133	697
Reg. *v.* Barker	25 Q. B. D. 213	787
—— *v.* Bucklugh (Duchess)	1 Salk. 357	786
—— *v.* Bucknell	7 Mod. 55	786
—— *v.* Petrie	4 E. & B. 737	423
—— *v.* Thomas	7 E. & B. 399	423
—— *v.* Wallingford Union	10 Ad. & E. 259	117
Reid *v.* Explosives Company	19 Q. B. D. 264	470
Rendle *v.* J. Edgcumbe Rendle & Co.	63 L. T. 94	576
Rex *v.* Butcher	24 Times L. R. 797	41
—— *v.* Ellis	1 M. & S. 652	96
—— *v.* Phillips	25 Times L. R. 764	41
—— *v.* Stoughton	2 Saund. 157	786
Rhodes, In re	44 Ch. D. 94	198
——— *v.* Muswell Hill Land Company	29 Beav. 560	399
Richards, Ex parte	1 Jac. & W. 264	324
——— *v.* Swansea Improvement and Tramways Company	9 Ch. D. 425	583
Richmond's Case	4 K. & J. 305	76
Ridgway *v.* Newstead	3 D. F. & J. 474	561
Roberts *v.* Richards	54 J. P. 693	376

		PAGE
Roberts *v.* Williams	4 Hare, 129	325
Robinson *v.* Barton-Eccles Local Board	21 Ch. D. 621; 8 App. Cas. 798	374
——— *v.* Mullett	4 Price, 353	833
Rodes, In re	[1909] 1 Ch. 815	774
Rosewell *v.* Bennett	3 Atk. 77	594
Rossiter *v.* Miller	3 App. Cas. 1124	288
Rourke *v.* Robinson	[1911] 1 Ch. 480	323
Rownd *v.* Pickett	47 L. J. (Ch.) 631	628
Royal Bank of India's Case	L. R. 4 Ch. 252	77
Royal Warrant Holders' Association *v.* Edward Dean & Beal, Ld.	28 Times L. R. 6; [1902] 1 Ch. 10	41
——— *v.* Slade & Co.	25 Rep. Pat. Cas. 245	16
Rymer, In re	[1895] 1 Ch. 19	781

S.

Sadd *v.* Griffin	[1908] 2 K. B. 510	52
St. George's Local Board *v.* Ballard	[1895] 1 Q. B. 702	376
Salisbury (Marquis) *v.* Keymer	[1909] W. N. 31	266
Salmon, In re	42 Ch. D. 351	267
Sandys, Ex parte	42 Ch. D. 98	77
Saunders, In re	[1898] 1 Ch. 17	259
——— *v.* Vautier	Cr. & Ph. 240	492
Schoole *v.* Sall	1 Sch. & Lef. 176	323
Schroder's Case	L. R. 11 Eq. 131	710
Scott, In re	[1901] 1 K. B. 228	392
—— *v.* Brown, Doering, McNab & Co.	[1892] 2 Q. B. 724	724
—— *v.* Nixon	3 D. & War. 388	2
Scurfield *v.* Howes	3 Bro. C. C. 90	250
Sewell's Case	L. R. 3 Ch. 131	77
Shaw *v.* Cates	[1909] 1 Ch. 389	266
——— *v.* Royce, Ld.	[1911] 1 Ch. 138	147
Sherwood & Cotton *v.* Decorative Art Tile Company	4 Rep. Pat. Cas. 207	617
Shilson, Coode & Co., In re	[1904] 1 Ch. 837	53
Shudal *v.* Jekyll	2 Atk. 516	591
Shuttleworth *v.* Le Fleming	19 C. B. (N.S.) 687	97
Sibley *v.* Cook	3 Atk. 572	395
Simmons *v.* Mathieson & Co.	28 Rep. Pat. Cas. 486	617
Slade *v.* Chaine	[1908] 1 Ch. 522	69
Slater, In re	[1907] 1 Ch. 665	29, 830
Smethurst *v.* Hastings	30 Ch. D. 490	266
Smith *v.* Martin	[1911] 2 K. B. 775	822
——— *v.* Poole	12 Sim. 17	196
Snape *v.* Dobbs	1 Bing. 202	98
Solio Case	[1898] A. C. 571	658
Somatose Case	[1894] 1 Ch. 645	657
Somerset, In re	[1894] 1 Ch. 231	266
Southampton (Lord) *v.* Hertford (Marquis)	2 V. & B. 54	349
South-West Suburban Water Company *v.* St. Marylebone Union	[1904] 2 K. B. 174	113, 849
Spargo's Case	L. R. 8 Ch. 407	710
Speight, In re	22 Ch. D. 727	271
Spitzel *v.* Chinese Corporation	80 L. T. 347	710
Stace and Worth's Case	L. R. 4 Ch. 682	77

		PAGE
Stafford's (Lord) Settlement and Will, In re	[1904] 2 Ch. 72	258
Stamford and Warrington (Earl), In re	[1911] 1 Ch. 648	785
Stamford, Spalding and Boston Banking Company *v.* Smith	[1892] 1 Q. B. 765	196
Stead, In re	[1900] 1 Ch. 237	595
Stevens *v.* Mid Hants Railway Company	L. R. 8 Ch. 1064	743
Stewart, In re	[1908] 2 Ch. 251	501
Stirling *v.* Forrester	3 Bli. 575	242
Stockton and Darlington Railway Company *v.* Barrett	11 Cl. & F. 590	117, 850
Stokoe *v.* Robson	19 Ves. 385	324
Stringer *v.* Gardiner	4 De G. & J. 468	437
Strong *v.* Bird	L. R. 18 Eq. 315	498
Stroud *v.* Gwyer	28 Beav. 130	69
Stuart, In re	[1897] 2 Ch. 583	267
——, In re	4 De G. & J. 317	326
Syer *v.* Gladstone	30 Ch. D. 614	255

T.

Taff Vale Railway Company *v.* Cardiff Gas Light and Coke Company	71 J. P. 350	88
Tanner *v.* Smart	6 B. & C. 603	204
Tanqueray-Willaume and Landau, In re	20 Ch. D. 465	454
Tasker (W.) & Sons, Ld., In re	[1905] 2 Ch. 587	739
Taylor *v.* Chester	L. R. 4 Q. B. 309	725
—— *v.* Metropolitan Board of Works	L. R. 2 Q. B. 213	376
Telfair, In re	86 L. T. 496	628
Tewart *v.* Lawson	L. R. 18 Eq. 490	349
Thompson, In re	30 Ch. D. 441	52
—— *v.* Maberly	2 Camp. 573	612
—— *v.* Sunderland Gas Company	2 Ex. D. 429	83
Thomson *v.* Attorney-General	12 Cl. & F. 1	545
Thorne *v.* Cann	[1895] A. C. 11	739
Timmis, In re	[1902] 1 Ch. 176	453
Tootal's Trusts, In re	23 Ch. D. 532	546
Toplis *v.* Baker	2 Cox, 118	394
Toulmin *v.* Steere	3 Mer. 210	736
Townsend, In re	2 Ph. 348	324
Trafford *v.* St. Faith's Rural Council	74 J. P. 297	423
Tunbridge Wells Corporation *v.* Baird	[1894] 2 Q. B. 867; [1896] A. C. 434	87
Turner, In re	[1897] 1 Ch. 536	267
—— *v.* Ringwood Highway Board	L. R. 9 Eq. 418	424
—— *v.* Walsh	6 App. Cas. 636	423
Turney, In re	[1899] 2 Ch. 739	697
Turnock *v.* Sartoris	43 Ch. D. 150	571
Turvin *v.* Newcome	3 K. & J. 16	347
Tussaud *v.* Tussaud	44 Ch. D. 678	576
Tweddell *v.* Tweddell	2 Bro. C. C. 101	235

U.

		PAGE
Underfeed Stoker Company of America *v.* American Ship Windlass Company	165 Fed. Rep. 65	637

V.

Valdez's Trusts, In re	40 Ch. D. 159	395
Vawdry *v.* Geddes	1 Russ. & My. 203	492
Venn and Furze's Contract, In re	[1894] 2 Ch. 101	454
Vernon *v.* St. James, Westminster	16 Ch. D. 449	422
Verschure and Zoon's Application, In re	22 Rep. Pat. Cas. 568	646
Victorian Daylesford Syndicate, Ld. *v.* Dott	[1905] 2 Ch. 624	723

W.

Wakefield Rolling Stock Company, In re	[1892] 3 Ch. 165	78
Walker, In re	59 L. J. (Ch.) 386	268
——— *v.* Jones	L. R. 1 P. C. 50	325
Wallace *v.* Attorney-General	L. R. 1 Ch. 1	545
Walter *v.* Rumbal	1 Ld. Raym. 53	462
Walters, In re	9 Beav. 299	53
Ware *v.* Polhill	11 Ves. 257	349
Waring *v.* Ward	7 Ves. 332	231
Watkins *v.* Cheek	2 S. & S. 199	455
Watling *v.* Lewis	[1911] 1 Ch. 414	721
Watson *v.* McAllum	87 L. T. 547	287
Webb *v.* Russell	3 T. R. 393	194
Webber, In re	[1896] 1 Ch. 914	554
Weingarten Brothers *v.* Charles Bayer & Co.	22 Rep. Pat. Cas. 341	650
Welton *v.* Saffery	[1897] A. C. 299	76
Wenlock (Baroness) *v.* River Dee Company	36 Ch. D. 675, n.; 10 App. Cas. 354	81
Wentworth *v.* Tubb	1 Y. & C. Ch. 171	198
——— *v.* Wentworth	[1900] A. C. 163	522
Werner Motors, Ld. *v.* A. W. Gamage, Ld.	21 Rep. Pat. Cas. 137, 621	617
Western Assurance Company of Toronto *v.* Poole	[1903] 1 K. B. 376	147
Wetherell *v.* Collins	3 Madd. 255	324
Whalley, In re	20 Beav. 576	52
———, In re	[1906] 1 Ch. 565	732
Wheeldon *v.* Burrows	12 Ch. D. 31	96
Wheeler, In re	1 D. M. & G. 434	329
Whistler, In re	35 Ch. D. 561	454
White, In re	17 L. R. Ir. 223	25
White and Smith's Contract, In re	[1896] 1 Ch. 637	484
White *v.* Baker	2 D. F. & J. 55	250
White's Case	12 Ch. D. 511	710
Willesford *v.* Watson	L. R. 8 Ch. 473	570
Williams *v.* Hathaway	6 Ch. D. 544	721

		PAGE
Williams *v.* Wentworth	5 Beav. 325	198
Wiltshire *v.* Smith	3 Atk. 89	323
Winans *v.* Attorney-General	[1910] A. C. 27	544
Winn *v.* Bull	7 Ch. D. 29	287
Winterbottom *v.* Derby (Lord)	L. R. 2 Ex. 316	423
Wintle, In re	[1896] 2 Ch. 711	492
Wiseman *v.* Westland	1 Y. & J. 117	743
Wolmershausen *v.* Gullick	[1893] 2 Ch. 514	235
Wood *v.* Penoyre	13 Ves. 325	222
Wood's Estate, In re	1 D. J. & S. 465	198
Woods *v.* Huntingford	3 Ves. 128	235
Worthington *v.* Morgan	16 Sim. 547	740
Wragg, Ld., In re	[1897] 1 Ch. 796	707

Y.

Young and Harston's Contract, In re	31 Ch. D. 168	325

INSTRUCTIONS FOR BINDING

CHANCERY DIVISION—VOL. I. (1912).

Parts I. to VI. of the Monthly Parts, and the Title, Tables of Cases, &c., to Vol. I. (1912) published in July, will be required for binding.

Each signature is followed by a figure, to facilitate the examination of the sheets after collating.

Cancel Advertisements, Circulars, Notices, Monthly Indexes, and Pages on coloured paper.

The signatures in the Volume, after the Cancels have been taken out, will consist of B C and *B* to 3 *R*.

NOTE.—The List of Council of Law Reporting, facing the Title, must be bound with each Volume.

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re TEWKESBURY GAS COMPANY. TYSOE *v.* THE COMPANY.

[1910 T. 1031.]

C. A. 1911 Nov. 3.

Company—Debenture—Construction—Principal repayable "on or after" a specified Date—Power of Company to repay by Drawings—Due Date of Principal—Inadmissibility of Prospectus to explain Meaning of Debenture—Provision void for Repugnancy.

APPEAL by the company from the decision of Parker J. (1)

Romer, K.C., and *Luxmoore*, for the appellants.
A. Grant, K.C., and *Owen Thompson*, for the respondent.

The COURT (Cozens-Hardy M.R., Fletcher Moulton L.J., and Farwell L.J.) without calling upon counsel for the respondent dismissed the appeal.

Solicitors for appellants: *Thwaites & Thompson, for Sidney Baker, Tewkesbury.*
Solicitors for respondent: *Surr, Gribble, Nelson & Oliver, for Brookes & Badham, Tewkesbury.*

(1) [1911] 2 Ch. 279.

G. A. S.

SWINFEN EADY J.

1911

Oct. 26; *Nov.* 11.

In re ATKINSON AND HORSELL'S CONTRACT.

[1911 A. 681.]

Vendor and Purchaser—Contract—Title—Title to commence with Devise in 1842 *—Abstract from* 1842 *shewing Ouster of true Owner in* 1874*—Subsequent Possessory Title—Title forced on Purchaser.*

A contract for sale of land in 1911 provided that the title should commence with a general devise in the will of a testator who died in 1842 and whose seisin was to be assumed.

The vendor in fact derived title from a disseisor who in 1874, under a mutual mistake as to the effect of the will, ousted the true owner, who was under no disability, and obtained possession of the property and the title deeds.

The disseisor and those claiming under her had been in possession for the thirty-seven years since 1874. The mistake was not realized at the date of the contract, so that the fact that the title was partly possessory was not mentioned therein:—

Held, that the vendor had shewn a good title and that it could be forced on the purchaser.

Scott v. *Nixon* (1843) 3 D. & War. 388, and *Games* v. *Bonnor* (1884) 33 W. R. 64; 54 L. J. (Ch.) 517, applied.

Vendor and Purchaser Summons.

This was a summons by the purchaser for a declaration that the vendor had not shewn a good title to the hereditaments comprised in the contract and for return of the deposit with interest, costs of investigating the title, and costs of the application.

By a contract in writing dated February 28, 1911, the vendor agreed to sell and the purchaser to purchase for 3000*l.* certain freehold land at Chertsey containing 30 a. 0 r. 30 p., forming lot 5 in certain particulars of sale and described as high-lying freehold building land with extensive frontage to a high road, ripe for immediate development, and affording magnificent sites for the erection of superior residences. The purchase was to be completed on May 1, 1911. The purchaser paid 300*l.* deposit.

The contract provided that the title should commence with a general devise of the Almners Estate contained in the will of George Cathrow, who died in 1842, and the purchaser should

assume the seisin or ownership of the testator, and that the property passed by the devise. All recitals contained in any abstracted deed or document dated twenty years or upwards prior to the date of sale were to be taken as conclusive evidence of the facts or matters appearing therein respectively.

The paper title was as follows: By his will dated May 18, 1838, George Cathrow devised the Almners Estate to the use of his son James Cathrow for life, with remainder to the use of James Cathrow's sons successively according to seniority in tail, with remainder to the use of James Cathrow's daughters as tenants in common in tail with cross-remainders between them, with remainder to the use of the testator's own right heirs.

The testator George Cathrow died on February 26, 1842, leaving James Cathrow his heir-at-law. James Cathrow died on June 2, 1874, without having had any issue except an infant son who had predeceased him, so that at his death his remainder in fee simple vested in possession.

By his will, dated April 6, 1871, James Cathrow devised all his real and personal estate to his wife, Mary Ann Frances Cathrow, and appointed her his executrix. She survived him and proved his will on June 25, 1874. The property really passed to her under this will, but the title was not traced through her at all, but through Lady Colquhoun under the following circumstances.

It appeared that on the death of James Cathrow the contention was put forward that the property passed to the person who would have been the right heir of George Cathrow if he had died the moment after James Cathrow died; in other words that the right heir of George Cathrow was to be ascertained with reference to the date of James Cathrow's death instead of at the date of George Cathrow's death. On this erroneous assumption the heir-at-law was Lady Colquhoun, wife of W. A. Atkinson and daughter of another deceased son of George Cathrow.

In 1874 Lady Colquhoun claimed the property as George Cathrow's heiress and demanded and obtained the title deeds from James Cathrow's widow and devisee, and it was alleged that she entered into possession. It actually appeared that under an order of February 8, 1884, made in the chambers of Bacon V.-C., a sum of over 1500*l.* capital money in Court to an account

SWINFEN EADY J.

1911

ATKINSON AND HORSELL'S CONTRACT, *In re.*

entitled "In the matter of the trusts of the estate of George Cathrow deceased," representing the purchase-money of part of the Almners estate taken by the London and South Western Railway Company in James Cathrow's lifetime, was paid out to the trustees of Lady Colquhoun's marriage settlement on the basis that she had become entitled to that estate as George Cathrow's heiress-at-law, and certain income that had accrued during James Cathrow's life was paid out to his wife as his legal personal representative.

The title was traced to the present vendor through her mother, Lady Colquhoun, who died on September 24, 1902.

On perusing the abstract the purchaser took the objection that the property had passed under James Cathrow's will to his wife, and that Lady Colquhoun was a trespasser. The vendor replied, "The vendor does not admit this for a moment." On May 8, 1911, the purchaser issued this summons.

After the summons was issued the vendor claimed that she had shewn a good title up to 1874 and a good possessory title since that date, alleging that in 1874 Lady Colquhoun entered into possession and receipt of the rents and profits of the Almners estate and that she and those claiming under her had been in possession ever since. Some evidence of this possession was given, and the vendor was prepared to prove it up to the hilt. The purchaser, however, objected that he was not bound to take a partly possessory title.

Hon. E. C. Macnaghten, K.C., and *A. Guest Mathews*, for the purchaser. The contract was for a title commencing with the will of George Cathrow, who died in 1842. That means a title properly traced by devolution from George Cathrow down to the present vendor. That was the title purported to be shewn on the abstract. But that title is clearly bad since 1874, and the vendor cannot carry out her contract. She cannot possibly shew any title by devolution from George Cathrow. The vendor now offers a possessory title. But in the first place the purchaser cannot be compelled to enter into a new contract: *In re Bryant and Barningham's Contract.* (1) Secondly, if the vendor

(1) (1890) 44 Ch. D. 218.

throws over her contract she must shew at least a forty years' title under the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 1: *Jacobs* v. *Revell* (1); Williams on Vendor and Purchaser, 2nd ed. vol. i. p. 104. That means a forty years' title in herself and those through whom she claims. But the vendor's title only begins with the precarious fee obtained by the disseisin of 1874. No doubt in 1886 the true title was barred. But that does not enable the vendor to shew a forty years' title. Her title is only thirty-seven years. She cannot claim any part of the prior title as hers. The old title was extinguished by the Statutes of Limitation—Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 34; Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), ss. 1, 5—but it was not transferred to the statutory owner: *In re Nisbet and Potts' Contract.* (2) The vendor can therefore only shew a thirty-seven years' title, and the purchaser is not bound to accept it.

Micklem, K.C., and *Dighton Pollock*, for the vendor. The vendor has shewn a continuous title from 1842, commencing with George Cathrow's will. In 1874 James Cathrow's wife, the true owner under no disability, was ousted by Lady Colquhoun. In 1886 the true owner was barred and the statutes executed a conveyance of the property to Lady Colquhoun: *Scott* v. *Nixon.* (3) The title is therefore traced by devolution from George Cathrow and is a title in accordance with the contract.

Suppose, however, that the statutes merely extinguished the old title and did not transfer it. The vendor has still shewn a title commencing with George Cathrow's will. Having traced the title into James Cathrow's wife, the vendor has shewn a thirty-seven years' possessory title against the true owner. The contract does not mean that the vendor must necessarily trace her title by devolution from George Cathrow. It is quite sufficient for her to begin with the title under his will and shew that in 1874 her predecessor obtained a possessory title good against all the world but the true owner, who was barred in 1886.

(1) [1900] 2 Ch. 858.
(2) [1905] 1 Ch. 391, 399; [1906] 1 Ch. 386.
(3) 3 D. & War. 388, 407.

SWINFEN EADY J.

1911

ATKINSON AND HORSELL'S CONTRACT, *In re.*

A possessory title of this nature will be forced on a purchaser: *Scott* v. *Nixon* (1); *Games* v. *Bonnor*. (2)

In *Scott* v. *Nixon* (1) a title of forty-eight years' possession against the true owner was forced on a purchaser though sixty years' title was then requisite on an open contract.

In *Games* v. *Bonnor* (2) a twelve years' possessory title against the true owner was forced on a purchaser. The contract dated August 31, 1880, stipulated that a mortgage of June 21, 1859, should be the root of title. An examination of the prior title shewed that at the date of the mortgage Mrs. Williams was tenant in tail under an estate tail created in 1799. By some error she was treated as life tenant, and her eldest son William, who was merely expectant heir in tail, purported to execute the mortgage as tenant in tail in remainder. William predeceased his mother, so that his expectancy never ripened into an estate tail, and the entail was unaffected by the mortgage. Mrs. Williams, the tenant in tail, died on January 28, 1869, and her son William having had no issue, the estate devolved on another son, Thomas, who was under no disability. On January 29, 1869, the vendor took possession as mortgagee, and completed his twelve years' possession on January 29, 1881, without giving any acknowledgment to Thomas. The purchaser having refused this possessory title, the vendor sued for specific performance, and both Pearson J. and the Court of Appeal forced the title on the purchaser, although the root of title was wholly bad, and the vendor had no title whatever at the date of the contract.

That was a specific performance action, but the Court can deal with the matter in the same way on a vendor and purchaser summons: *In re Burroughs, Lynn, and Sexton.* (3)

In *In re Bryant and Barningham's Contract* (4) no title was shewn at the hearing, but the vendors offered to procure a new title. This was of course too late. If a good title is shewn at the hearing, the purchaser must accept it, although it is not the exact title offered by the contract: *In re Baker and Selmon's Contract.* (5) It is not necessary that the title

(1) 3 D. & War. 388.
(2) 33 W. R. 64; 54 L. J. (Ch.) 517.
(3) (1877) 5 Ch. D. 601.
(4) 44 Ch. D. 218.
(5) [1907] 1 Ch. 238, 241, 243.

should be fully proved at the hearing. That can be done in chambers.

Hon. E. C. Macnaghten, K.C., in reply. In *Games* v. *Bonnor* (1) the flaw in the mortgage of 1859 discovered on investigating the prior title was apparently treated as cured by effluxion of time, and the vendor was able to sell as mortgagee in possession under the actual root of title offered by the contract. That is exactly what the vendor cannot do in the present case. However good her possessory title may be, it is a title not under but against the will of George Cathrow, which she has made the root of her title. That is not a title according to the contract.

Cur. adv. vult.

Nov. 11. SWINFEN EADY J. (after stating the facts). Until after the issue of the summons, the vendor had insisted that Lady Colquhoun was the person rightfully entitled to enter on the death of James Cathrow, and that the abstract disclosed a good title in accordance with the contract, the property devolving upon her on the death of James Cathrow. It is now admitted, however, that a mistake has been made, and that she entered without title in 1874. The vendor, however, claims that she can make a good possessory title having regard to the Statutes of Limitation, and asks that the purchaser may complete his purchase on that footing. The purchaser is not willing to do this, if he can avoid it, as he says that he is a builder, bought the land to erect buildings upon it, and will have difficulty in raising money on mortgage, if he has only a possessory title.

In my opinion the vendor has in fact shewn a good title to the land in question. It appears that George Cathrow purchased the property from the Crown in September, 1828, and the certificate of the Commissioners of Woods and Forests dated September 25, 1828, is recited in an abstracted deed of May 18, 1878, as having been duly enrolled. The property then passed under the wills of George Cathrow and James Cathrow to James Cathrow's wife, who became seised in fee thereof on June 2, 1874. This lady was not under any disability. The correspondence with her lawyers is in evidence, and it appears that on

(1) 33 W. R. 64; 54 L. J. (Ch.) 517.

SWINFEN EADY J.

1911

ATKINSON AND HORSELL'S CONTRACT, *In re.*

November 27, 1874, they wrote to Lady Colquhoun's solicitors stating that a short statutory declaration that Lady Colquhoun was heiress of the testator, George Cathrow, would be sufficient to enable them to advise their client to deliver up the deeds, and that upon the receipt of the declaration they would hand over the deeds of the property. The Statutes of Limitation began to run against James Cathrow's wife from the date when Lady Colquhoun entered into possession of the property, and all persons claiming through the wife are long since barred by the operation of the statutes. Thus the vendor has not only shewn a possessory title from the year 1874, but she has also shewn what the title to the property was, from the date of its sale by the Crown in 1828, and that the possession of the vendor has effectually barred the claims of the person rightfully entitled.

The purchaser objected that he could not be compelled to take a title depending on the Statutes of Limitation; but the vendor has shewn that her possession has effectually barred the claim of the person rightfully entitled; the purchaser will obtain a good title and can be compelled to accept it: *Scott* v. *Nixon* (1); *Games* v. *Bonnor*. (2)

The purchaser here, as in *Games* v. *Bonnor* (2), objected to take any title founded on the statutes and did not ask for further evidence, by statutory declaration or otherwise, of the fact of possession; otherwise I am satisfied it would have been adduced in chambers, as I gather there is no real doubt about the fact of possession. I determine that the purchaser is bound to take a title from the vendor, depending on the statutes, but proper evidence of the fact of possession from 1874 to the present time must be furnished to him, and the best course will be to let it be furnished out of Court. The obligation of the vendor is not only to "shew" a good title, but to "make" it by proper evidence. The only evidence actually furnished by the vendor up to the present time is paragraph 8 of the affidavit of George Dixon Atkinson Clark, filed in these proceedings on June 16, 1911, but he was not appointed a trustee of Lady Colquhoun's settlement, under which the vendor derives title, until July 29, 1882, and apparently lives in Northumberland, and has no personal

(1) 3 D. & War. 388. (2) 33 W. R. 64; 54 L. J. (Ch.) 517.

knowledge of the management of the property, or the actual payment of the rent from time to time.

It appears that from time to time different portions of the property have been in lease to different tenants, but no counterpart leases or agreements have been produced, nor any evidence as to the persons by whom they were granted. In short no proper evidence has yet been furnished shewing that the vendor and her predecessors have been receiving the rents and profits since 1874. The vendor herself has not given any evidence, or made any statutory declaration about possession, nor any steward or agent on her behalf. This evidence can be furnished out of Court. It may be now only a formal matter, but the purchaser is entitled to it.

There remains the question of costs. The purchaser has failed in his contention that he cannot be compelled to take a title depending on the Statutes of Limitation, and I cannot give him any costs. On the other hand the vendor, by her answers to requisitions and throughout the correspondence, insisted that Lady Colquhoun was entitled as heiress-at-law, and has not yet furnished the proper evidence of the fact of possession, so I cannot give costs to her. The proper order will be to let each party bear his own costs up to and including this hearing.

I will give liberty to apply in the event of any question arising about proof of possession, which, however, I do not anticipate. The fact that the title to the property has been sifted in Court, and found to be a good title, may assist the purchaser in any future dealings with the property.

Solicitors: *Durham, Carter & Durham; Beaumont, Son & Rigden, for Paine, Brettell & Porter, Chertsey.*

G. R. A.

WARRINGTON J.
1911
Oct. 17.

ROYAL WARRANT HOLDERS' ASSOCIATION *v.* EDWARD DEANE & BEAL, LIMITED.

[1911 R. 311.]

Royal Arms—Unauthorized User—Injunction—User in connection with Business—User unaccompanied by Words "By appointment"—"Calculated to lead to the belief"—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *s.* 68—*Evidence—Question as to Effect produced on Mind of Witness by Display of Royal Arms—Admissibility—Form of Order.*

By s. 68 of the Trade Marks Act, 1905, "If any person, without the authority of His Majesty, uses in connexion with any trade, business, calling, or profession, the Royal Arms . . . . in such manner as to be calculated to lead to the belief that he is duly authorised so to use the Royal Arms . . . . he may . . . . be restrained by injunction . . . . from continuing so to use the same . . . . ":—

Held, that the "belief" contemplated by the section was the belief on the part of the members of the public who see the display of the Royal Arms, and not merely that of present or prospective customers of the person wrongfully displaying them, the object of the section being to prevent the spreading of a belief among the public which might lead to an increase of prestige, and consequent business to the person wrongfully using the Royal Arms.

The defendants carried on business as engineers, manufacturers, and contractors. On the front of their premises above the shop front was fixed a cast-iron representation of the Royal Arms, containing the shield with the supporters, crest, and mottoes. The Arms had been in that position for at least thirty-five years and before the defendants took a lease of the premises. No such words as "By appointment" were used in connection with the Arms. The defendants had no authority to use the Royal Arms.

In an action by properly constituted plaintiffs under s. 68 of the Trade Marks Act, 1905, for an injunction to restrain the unauthorized user by the defendants of the Royal Arms:—

Held, that the defendants were using the Royal Arms in connection with their trade or business and in such manner as to be calculated to lead to the belief that they were duly authorized so to use them.

Held, therefore, that the plaintiffs were entitled to an injunction restraining the user by the defendants of the Royal Arms in connection with their trade or business "on their premises or otherwise."

The question put to a witness in examination, "What was the conclusion in your mind arising from the fact that defendants exhibited the Royal Arms on their business premises?" was held admissible by

analogy to the question permitted in passing-off cases, "Did you believe that the defendant's goods were the plaintiff's?"

Observations of Farwell J. in *Bourne* v. *Swan & Edgar, Ld.* [1903] 1 Ch. 211, 224, applied.

WITNESS ACTION.

The Royal Warrant Holders' Association was a body incorporated by Royal Charter on February 25, 1907, having for its objects, among others, "(2.) To prevent the assumption or use by any person in connection with any trade, business, calling, or profession of the Royal Arms (or Arms so nearly resembling the same as to be calculated to deceive) or any device, emblem or title in any manner which for the time may not be duly authorised by law. (3.) To prevent the false representation by any person that any goods are made by a person holding a Royal Warrant or Authority to use the Royal Arms, Armorial Bearings or Insignia, or for the service of Us or any member of Our Royal Family or a Government Department. (4.) To prevent the representation by any person without the authority of Us or other lawful express authority that such person enjoys Royal patronage or the patronage of a Government Department. (5.) To take action for the enforcement of laws affecting the above matters." The association was also by warrant expressly authorized to use the Royal Arms.

The defendants and their predecessors in title had for many years carried on business as engineers, manufacturers, and contractors on premises No. 1, Arthur Street East, in the city of London, which they held under a lease from the Corporation of London dated March 10, 1834, expiring at Christmas, 1912. On the front of the premises there had been for certainly thirty-five years, and probably longer, a representation of the Royal Arms. This was in cast iron, painted. It contained the shield with the supporters, crest, and mottoes. Since the incorporation of the defendant company in 1907 the position of the representation of the Royal Arms had been between the two windows of the first floor. On each of those windows were the words "Edward Deane & Beal, Ltd., Engineers," in opal letters on glass; immediately underneath, on the plinth on which the Royal Arms stood, were the words "Established 1700"; immediately below

WARRINGTON J.
1911
ROYAL WARRANT HOLDERS' ASSOCIATION v. EDWARD DEANE & BEAL, LIMITED,

that was the fascia with "No. 1. Edward Deane & Beal, Ltd.," and underneath, on the lintel of the shop, were the words "Engineers, Manufacturers, Contractors." Then came the window with a description of what it was that the defendants contracted to supply; and there was a statement on the side of the window that they were contractors to the Admiralty, the Crown Agents for the Colonies, the Indian and Egyptian Governments, the London County Council, the Office of Works, and the Army Council. The defendants acquired the business on their incorporation in 1907.

This was an action brought by the plaintiff association, by the express authority of the Lord Chamberlain, against the defendants for an injunction to restrain the defendants, their officers, servants, and agents (1.) from using in connection with their trade or business on their premises or otherwise the Royal Arms, or arms so closely resembling the same as to be calculated to deceive, without the authority of His Majesty, in such manner as to be calculated to lead to the belief that they were duly authorized to use the Royal Arms, and (2.) from using in connection with their trade or business on their premises or otherwise any such arms without the authority of His Majesty or of a member of the Royal Family in such a manner as to be calculated to lead to the belief that they were employed by, or supplied goods to, His Majesty or a member of the Royal Family.

The defendants by their defence alleged that they carried on a wholesale business which in fact had been in existence since 1700; that they had a coat of arms which was practically that of the Royal Arms with certain additions and the Royal mottoes; that this was attached to the outside of the house in which they carried on their business, as it had been long before the plaintiffs' association had been formed and for at least forty years before the commencement of the present action; that there were no such words on or in connection with such coat of arms as "By Royal Warrant," "By special appointment," or anything else in accordance with the practice of Royal Warrant holders. They further alleged that they did not use the Arms in connection with their business, that they displayed them nowhere except on

their house, and that they had a special device of a rising sun for their papers, invoices, &c. They admitted that they were not and never had been authorized to use the Royal Arms in connection with their business and did not supply goods to His Majesty or any member of the Royal Family; but they claimed that they had a right to keep the Arms on their house as they did.

It appeared from the evidence that authority to use the Royal Arms was granted by the Departments of the Privy Purse, the Lord Chamberlain, the Lord Steward, and the Master of the Horse, and that it was the practice of some of these Departments to attach to the grant a condition that the warrant holders should use such words "By appointment."

Astbury, K.C., and *Sebastian*, for the plaintiffs.

H. Terrell, K.C., and *E. Beaumont*, for the defendants.

[At the trial *Astbury, K.C.*, proposed to ask one of the plaintiffs' witnesses, a commercial traveller who for the last twenty-five years had constantly been in the habit of passing the defendants' premises, the question "What was the conclusion in your mind arising from the fact that the defendants exhibited the Royal Arms on their business premises?" The question was objected to.]

Astbury, K.C., submitted that the question was admissible. In passing-off cases the question whether the witness has in fact been induced to believe that the defendant's goods were the plaintiff's is admissible, and the present question is admissible by analogy: *Bourne* v. *Swan & Edgar, Ld.* (1)

H. Terrell, K.C. The question is not admissible. The witness is not an expert, and it is only an expert who can be asked his opinion on an issue which the Court has to determine.

WARRINGTON J. The question which Mr. Astbury proposed to put to this witness is in effect—I have not taken down the words quite accurately—"What was the conclusion in your mind arising from the fact that the defendants exhibited the Royal

(1) [1903] 1 Ch. 211, 224.

WARRINGTON J.

1911

ROYAL WARRANT HOLDERS' ASSOCIATION v. EDWARD DEANE & BEAL, LIMITED.

Arms on their business premises?" It is objected that that question is inadmissible on the ground that the answer to it could not possibly be evidence. The point arises in this way. The Trade Marks Act, 1905, by s. 68, enables an injunction to be obtained in case any person uses the Royal Arms in connection with his business in such manner as to be calculated to lead to the belief that he is duly authorized so to use them. One question I have to determine, therefore, in this case is whether the Royal Arms are so used by the defendants as to be calculated to lead to the belief that they are authorized to use them. Now it has been determined in *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.*(1) that in a passing-off case the question whether a certain mark is calculated to deceive is inadmissible. And I agree that if in this case the witness had been asked whether in his opinion the display of the Royal Arms by the defendants was calculated to lead to the belief referred to in the section, that question would have been inadmissible. Why is it inadmissible? It is inadmissible, as explained by Farwell J. in *Bourne* v. *Swan & Edgar, Ld.* (2), chiefly on the ground put by Lord Halsbury in *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.* (1), that that question is the very issue which the Court has to determine. And Farwell J. adds another reason against the admissibility, namely, that he cannot see "how you can call any individual to give what is in truth expert evidence as to human nature, because what they are asked in this form of question is, not what would happen to them individually, but what they think the rest of the world would be likely to suppose or believe. They are not experts in human nature, nor can they be called to give such evidence." Those are the reasons why that question is not admissible. Now why the question which is proposed to be put is not admissible I fail to see. I have to apply the analogy of the passing-off cases, and the question proposed to be put is the question which in a passing-off case might be put to a witness, "Were you in fact deceived?" That is, "Did you (the particular person) believe that the defendant's goods were the plaintiff's, and did you form that belief from the

(1) [1899] A. C. 83. (2) [1903] 1 Ch. 211, 224.

mode in which the goods were made up?" That, in my opinion, would be an admissible question. It is in fact the question which is referred to in *Bourne* v. *Swan & Edgar, Ld.* (1) as one class of evidence which, in Farwell J.'s opinion, may be called. He says: "The second point is that it was not necessary in the old Court of Chancery, and is not now in the Chancery Division, in passing-off cases to prove that any person has actually been deceived. Of course the fact, if proved, that persons of ordinary intelligence have in truth been deceived, would be very material in assisting the Court in coming to the conclusion that the mark or the picture complained of was calculated to deceive." So here, if I have evidence that a person of ordinary intelligence and some experience in such matters has actually formed a belief that the defendants were authorized to use the Royal Arms, that must be of some importance in determining the question whether that use is calculated to lead to that belief. In my opinion this question is admissible, just as in a passing-off case the question "Did you believe that the defendant's goods were the plaintiff's?" would be admissible.

It appeared from the evidence of several subsequent witnesses that the display of the Arms had led them to believe that the defendants were warrant holders.

Astbury, K.C., and *Sebastian*, for the plaintiffs. This is the first case in which a claim by the plaintiffs to stop the unauthorized user of the Royal Arms has been resisted. Prior to 1883 there was no statutory prohibition against the user of the Royal Arms by unauthorized persons. By s. 106 of the Patents, Designs and Trade Marks Act, 1883, the unauthorized user was made a misdemeanour punishable with a fine. For that provision, however, an alternative was provided by s. 68 of the Trade Marks Act, 1905 (2), which empowers the High

(1) [1903] 1 Ch. 223.

(2) Trade Marks Act, 1905, s. 68: "If any person, without the authority of His Majesty, uses in connexion with any trade, business, calling, or profession, the Royal Arms (or arms so closely resembling the same as to be calculated to deceive) in such manner as to be calculated to lead to the belief that

WARRINGTON J.
1911
ROYAL WARRANT HOLDERS' ASSOCIATION v. EDWARD DEANE & BEAL, LIMITED.

Court to grant injunctions to prevent such user. In the present case it is submitted that what the defendants are doing falls clearly within s. 68. They are displaying the Royal Arms in a prominent position over the front of their business premises, and are therefore using them in connection with their business. It is true that they do not use the words "By appointment" or similar words in connection with this display; but that is not material, for many warrant holders do not do so either, and the effect on the mind of the public is not affected by the absence of such words. The public know that the Arms ought not to be used without proper authority. Further, having regard to the fact that in addition to displaying the Royal Arms the defendants also exhibit the statement on their premises that the firm has been established since 1700 and that they are contractors to the Admiralty, the Crown Agents for the Colonies, the Office of Works, and the Army Council, they thereby lead the public to believe they are Royal Warrant holders. It is contended that inasmuch as the defendants and their predecessors in title have displayed these Arms on the premises for forty years without interference they ought not now to be interfered with; but the very object of the passing of s. 68 was to prevent such unauthorized user.

Royal Warrant Holders' Association v. *Slade & Co.* (1) is an instance in which a perpetual injunction restraining the unauthorized user of the Royal Arms was granted.

H. Terrell, K.C., and *E. Beaumont*, for the defendants. The plaintiffs have not shewn, as they are bound to shew, that the defendants are using the Royal Arms in connection with their business. The representation of the Royal Arms to which the

---

he is duly authorised so to use the Royal Arms, or if any person without the authority of His Majesty or of a member of the Royal Family, uses in connexion with any trade, business, calling, or profession any device, emblem, or title in such manner as to be calculated to lead to the belief that he is employed by or supplies goods to His Majesty or such member of the Royal Family, he may, at the suit of any person who is authorised to use such arms or such device, emblem, or title, or is authorised by the Lord Chamberlain to take proceedings in that behalf, be restrained by injunction . . . . from continuing so to use the same . . . ."

(1) (1908) 25 Rep. Pat. Cas. 245.

plaintiffs take objection was a fixture on the premises when the defendants took their lease, and under it they have no power to remove it. By merely allowing it to remain affixed to the premises the defendants cannot be said to be using the Royal Arms in connection with their business. Nor by painting it can they be said to be so using them, for that they are bound to do under the terms of their lease. If the plaintiffs are right in their contention, no business could be carried on in a house on which a representation of the Royal Arms appeared as part of its architectural ornament unless such representation were first obliterated. The user contemplated by the section is an active user of the Arms by a trader in his business, and not a mere passive user as here.

Assuming, however, that the defendants are using the Arms in connection with their business, the plaintiffs have further to shew that such user is "calculated to lead to the belief" that they are authorized to use them. The words "calculated to lead to the belief" in s. 68 must, it is submitted, mean calculated to lead to the belief on the part of customers or possible prospective customers. The mischief intended to be remedied by the section was that arising from persons who were not Royal Warrant holders holding themselves out as such. The defendants here do not use their premises as a shop in the ordinary sense of the term, that is, they do not sell anything there. Practically the whole of their business is conducted by correspondence or at interviews by appointment. Under those circumstances there is no likelihood of any one being deceived by the display of the Arms over the premises.

Further the display by a trader of the Arms by themselves is not a representation that he is a Royal Warrant holder. There must in addition to the display be the use of the words "By appointment" or similar words. The defendants have throughout acted bona fide in the matter.

Astbury, K.C., was not called on to reply.

WARRINGTON J. This is an action brought by an incorporated association—the Royal Warrant Holders' Association—who are a corporation authorized to use the Royal Arms, and also authorized

WARRINGTON J.

1911

ROYAL WARRANT HOLDERS' ASSOCIATION v. EDWARD DEANE & BEAL, LIMITED.

by the Lord Chamberlain to take the present proceedings, for an injunction restraining the defendants from infringing the provisions of s. 68 of the Trade Marks Act, 1905, relating to the use of the Royal Arms. [His Lordship read the material parts of the section, and continued :]

The plaintiffs say that the defendants are using the Royal Arms in connection with their business and in such manner as to be calculated to lead to the belief that they are duly authorized so to use them. It is common ground that the defendants are not authorized to use the Royal Arms; and the question I have really to determine is whether, according to the true construction of the section, they are, on the facts, using the Arms in connection with their business, and in such a manner as to be calculated to lead to the belief that they have the necessary authority. The facts as to the defendants and their user of the Arms are very simple and are quite undisputed. [His Lordship stated the facts and described the manner in which the Royal Arms were displayed on the defendants' premises as above set forth, and continued :]

The defendants undoubtedly carry on their business on these premises. It is not an ordinary shop; that is to say, it is not a place to which the casual passer-by would go and buy something. It is not that kind of business at all: the defendants are contractors for carrying out works. The defendants do not use the Royal Arms on their business stationery; they only use them on the premises.

Now, in the first place, are the defendants thus using those Arms in connection with their business? I should say, in answer to that, that it is perfectly plain that they are using the Arms. The mere fact that the Arms were on the premises when the defendants took the lease of them—which is, of course, true—and that they are continuing to display them would not prevent that being a user of the Arms. They are certainly using the Arms. Are they using them in connection with their business? There can be but one answer to that, because the Arms are on their business premises; they are immediately over their name and the date of the defendants' establishment, and the names of the defendants and the description of their business are on either

side of them, on the windows. Anybody looking at that shop could not fail to see the display of the Royal Arms, or to see it in immediate conjunction with the description of the firm which are carrying on the business, and the business which they are carrying on. It seems to me that there can be but one possible answer to the question whether the Arms are being used in connection with the business, and that must be in the affirmative. It may be that there are cases in which the Arms may be displayed on business premises and yet could not be said to be used in connection with the business; but with that I have nothing to do. It will be time enough to deal with a case of that kind when it arises. All I have to do with is this case, and it seems to me that in this case the Arms are undoubtedly used in connection with the business.

The next question is, Are they used in such manner as to be calculated to lead to the belief that the defendants are duly authorized to use them? That is the second of the two questions which I have to determine. I may say at once that there is no question here of any fraud or improper dealing on the part of the defendants. They have taken these premises with the Arms in their present position, and they have carried on business, I am quite satisfied, under the bona fide belief that they were entitled to continue to use these Arms. But that, of course, does not excuse them. If they come in fact within the words of this section, according to its proper interpretation, then they are liable to the injunction which the statute provides. What then is meant by the use of the Arms in such manner as to be calculated to lead to a certain belief? It has been contended on the part of the defendants that that can only mean, to lead to that belief on the part of the persons who resort to these premises, or who want to become customers. But I do not take that view of the section. The section says "lead to the belief"; it does not say lead to that belief on the part of particular persons. I think it means, "lead to the belief" on the part of persons who see what is being done; and that that is a reasonable, and to my mind the only possible, construction will appear from the following considerations. How is it possible to say that persons who use the Arms do not get

WARRINGTON J.
1911
ROYAL WARRANT HOLDERS' ASSOCIATION v. EDWARD DEANE & BEAL, LIMITED.

business from the display of the Arms? It does not follow that they only get that business by the display of the Arms because the person who employs them has himself seen them. If a man does something which induces, or (to use the expression in the section) is calculated to lead to, a belief in a large number of persons, that belief is apt to filter amongst a large number of other persons; and how is it possible to say that Mr. Brown, who comes and gives an order, or writes an order from the country, to Edward Deane & Beal, Limited, cannot have been induced to give that order because he has been told by somebody who has himself been told by somebody else who had seen the Arms that these gentlemen use the Arms and therefore are authorized to use them and hold the Royal Warrant? It seems to me that that is exactly what the section meant to provide against—the spreading of a belief amongst the public which, the more it becomes public, may have the greater effect in producing the prestige which is supposed to, and I suppose in some cases actually does, bring about an increase of business. It seems to me that when the section says "lead to the belief" it means what it says—lead to the belief generally amongst persons who may be affected by the sight of what they see, namely, the user of these Arms. If that be the true construction of the section, are the Arms here used in such a manner as to be calculated to lead to the belief in question? I put aside for the moment the fact which I have heard about the use of the words "By appointment" and so on; I will come back to that presently. But for that, and simply seeing the Arms put up where they are, I should have said that the use of the Arms in connection with the business could have no other result, used as they are here, than to lead to the belief that the persons who use them are authorized to use them. They are put prominently forward in connection with the business; and used as they are in this case I should have thought the natural conclusion to draw from seeing them there is that they are being used with proper authority. They are used in such a conspicuous manner that it would occur to anybody who knew that authority was necessary that such user was improper unless such authority were granted. But then it is said, "Oh, no, that is not so; that cannot be

because nearly every one who has the proper authority, at all events of late years, when using the Arms has used also in immediate proximity to them the words 'By appointment.'" It is quite true that of the large number of warrant holders in London the great majority do use the words "By appointment," or similar words, in connection with the Royal Arms, and in immediate proximity thereto. The reason of that is, that since the accession of King Edward VII. it has been the practice, commencing in the year 1907, in the Lord Chamberlain's office, and I think in the other offices,—I am not quite sure about the Lord Steward, but it has been the practice at all events in the Lord Chamberlain's office, and in that of the Master of the Horse—to issue with the warrant a memorandum to the effect that it authorizes the use of the Royal Arms provided that the words "By appointment" are used in connection with them. That has brought about the practice to which I have referred, but that provision on the part of the departments issuing the warrant is not known to the public generally. It is merely an intimation given to the warrant holder, and the public generally do not know that the use of the Royal Arms without those words does not, or ought not to, indicate—I cannot say that it does not—that the authority exists. I cannot see myself that the omission of the words renders the use of the Arms any less calculated to lead to the belief that the authority exists. It is true there are a number of very prominent firms in London who do not use those words on their premises in connection with the Arms displayed on their premises. It seems to me quite idle to say that they use them on their stationery, or use them in some other way, or even exhibit the warrant framed inside the shop. The question is, what is the impression conveyed by the use of the Arms in the position in which they are used? I have the extremely well-known firm of George Kent in Holborn—very prominent premises—with the Arms without the words, displayed just as the defendants' are displayed, immediately over the description and over the lintel of the shop. Then I have the Express Dairy Company in, I think, Regent Street, with the Arms without the words, displayed in the same way in the middle of the front and immediately over the fascia.

WARRINGTON J.
1911
ROYAL WARRANT HOLDERS' ASSOCIATION v. EDWARD DEANE & BEAL, LIMITED.

Then I have Underwoods, the well-known cutlers in the Haymarket, with the arms displayed in the same way, without the words; and Hamburgher, Rogers & Co., in Covent Garden, I think. There again the Arms are displayed in that way. I have taken those cases of which there are photographs, but there are a number of other cases in which the same thing occurs. Also, for example, Brooks & Son, the fruiterers, in Regent Street; Bumpus, the booksellers, Hawkes, and Beattie, and I think there are some others. So that the omission of the words "By appointment" seems to me to be of no real importance at all; and if that is so, then I am thrown back on the conclusion to which I have said already that I should have come, independently of that contention. I think the defendants, who are unfortunately using these Arms, are using them in connection with their business, and in such manner as to be calculated to lead to the belief that they have the authority. That being so, I think the plaintiffs are entitled to their injunction, following the words of the section. I ought to have said this—that in order that there may be no question in the Court of Appeal, I have had some evidence of persons having been actually led into that belief. That no doubt tends to strengthen the view that the user is calculated to lead to that belief, but I do not rest my judgment on that. I think I should have formed the same opinion if I had not had that evidence.

With regard to the form of the order, I think that if I grant an injunction substantially in the terms of the first paragraph of the claim—that is, under that part of the section which refers to the Royal Arms—that will be sufficient. The only question is whether I ought to do it, simply following the words of the section, or whether I ought to insert into the order "on their premises or otherwise." The section prohibits the use of the Arms in such manner as to be calculated to lead to a certain belief. I have found that a particular user by the defendants is calculated to lead to that belief, and that is the user on their premises. In my opinion, it is in accordance with the practice of the Court in that case to specify in the order the user which the Court has found to be a violation of the right; and then, inasmuch as one violation has been established, the order should

go on to restrain the violation generally. I think, therefore, it is quite right that the order should go in the form to restrain the defendants from using, and so on, "on their premises or otherwise."

Solicitors: *Bannister, Ram & Fàche; Henry Gover & Son.*

W. I. C.

In re COCKRELL'S ESTATE.

[1907 C. 1402.]

Solicitor—Costs—Charging Order—Property recovered or preserved—Proceeding—Sale—Payment to Client—Discretion—Solicitors Act, 1860 (23 & 24 *Vict. c.* 127), *s.* 28.

In a creditor's administration action the usual decree was made on July 1, 1907. In January, 1910, the plaintiff entered into a contract for the sale of the only outstanding asset for 383*l.* The defendant, the surviving executrix, opposed the confirmation of this contract on the ground of undervalue, and the property was ordered to be sold by auction. At this sale, of which the defendant had the conduct, considerable expenses were incurred, and the property fetched 400*l.*, which was paid into Court. In January, 1911, on further consideration, an order was made that a sum of 64*l.* found due from the defendant to the estate should be set off against her costs, and that the residue of her costs and those of the plaintiff should be paid out of the 400*l.* The solicitors who had acted for the defendant throughout the proceedings applied for a charging order for the whole of their costs on the fund in Court as being property recovered or preserved in the proceedings within the meaning of s. 28 of the Solicitors Act, 1860:—

Held, affirming the decision of Neville J. [1911] 2 Ch. 318, that the order was in the discretion of the Court, and the Court would not make it in this case, because the order on further consideration practically ordered the same costs as those for which the solicitors now asked for a charge to be paid to their client.

APPEAL from a decision of Neville J. (1)

On May 6, 1907, the plaintiff, Mrs. E. G. Pinhey, commenced a creditor's action for the administration of the estate of J. W. Cockrell, who died on August 17, 1901, against his executor and executrix, and on July 1, 1907, she obtained a decree for administration with the usual accounts and inquiries. Before

(1) [1911] 2 Ch. 318.

C. A. 1911

COCKRELL'S ESTATE, *In re.*

the commencement of this action most of the debts due from the estate had been paid, and the only outstanding assets were certain property subject to a mortgage to the plaintiff and a third share in the Gorleston Land Company. The executor died in 1908, having previously become bankrupt, and the surviving defendant was now in poor circumstances.

On November 23, 1909, the Master made his certificate, wherein he stated that the debt due to the plaintiff amounted to 586*l.* 15*s.* after taking into account the mortgaged property; that the total debts due amounted to 623*l.* 18*s.* 6*d.*; that he had disallowed debts to the amount of 3090*l.* 0*s.* 6*d.*; that the defendants had received 625*l.* 0*s.* 4*d.* in respect of personal estate and paid 662*l.* 8*s.* 3*d.*, leaving a balance due to them of 37*l.* 7*s.* 11*d.*; and that there was a balance of 101*l.* 17*s.* 5*d.* due from them in respect of rents and profits of real estate, thus leaving a balance of 64*l.* 9*s.* 6*d.* due from them to the estate.

On January 26, 1910, the plaintiff entered into a conditional contract for the sale of the share in the Gorleston Land Company for 383*l.* and brought the contract before the Master for confirmation. The defendants' solicitors objected to the proposed sale on the ground that the property had been valued for probate shortly after the testator's death at 1171*l.* The Master refused to confirm the contract and directed that the property should be sold by auction. The surviving defendant had the conduct of the sale, and the property was sold for 400*l.*, which was paid into Court. The expenses of this sale were much larger than would have been incurred on a sale by private contract. On January 23, 1911, the action came before Swinfen Eady J. on further consideration, and he made an order that the sum of 64*l.* 9s. 6*d.* found due from the executors should be set off against their costs of the action, that the balance of their costs and the plaintiff's costs should be taxed and paid out of the 400*l.* in Court, and that the residue of the fund should be distributed between the three remaining creditors.

Messrs. Danby, Palmer & Blake had acted as solicitors for the defendants throughout the proceedings, and on March 8, 1911, they took out a summons asking for a declaration that they were entitled to a charge upon the 400*l.* as being property recovered

or preserved through their instrumentality for the defendants or other the parties interested in the estate of the testator, for the amount of their taxed costs, charges, and expenses of and in reference to the action, and that the same might be taxed as between solicitor and client and paid out of the fund accordingly.

Neville J. dismissed the summons with costs, and one of the applicants appealed.

Ward Coldridge, for the appellant. The learned judge refused to give us a charging order on the ground that an order to pay the costs out of the fund had already been made, and that the Court ought not to direct payment of the same costs out of a fund in Court twice over. That was a mistake. No order had been made for payment of costs to us.

[FLETCHER MOULTON L.J. To the extent of 64*l.* 9*s.* 6*d.* the costs have been actually paid by virtue of the set-off.]

A solicitor's right to a charge for his costs is not co-extensive with the right of his client; it is a higher and an independent right: *Bailey* v. *Birchall* (1); *In re White.* (2) If we recover a fund and cannot get costs out of it we shall have done work for the creditors and spent our own money for nothing. The order on further consideration did not destroy our right.

[FARWELL L.J. The set-off extinguished the debt pro tanto, and the order for payment of the rest of these costs was made in your presence.]

The 64*l.* 9*s.* 6*d.* was not paid out of the fund in Court, and we ought to have a charge for that amount and for the rest of our costs. We are not bound by the state of the accounts between our client and the estate; and if the set-off destroyed her debt it did not destroy ours.

If the Court has a discretion, then we submit that we ought to get the order, for otherwise we shall not be paid at all. Our costs of realization ought to come first: *Batten* v. *Wedgwood Coal and Iron Co.* (3)

By our efforts the proceeds of sale were increased and the estate was relieved from claims to the amount of 3090*l.*, so that

(1) (1865) 2 H. & M. 371. (2) (1885) 17 L. R. Ir. 223.
(3) (1884) 28 Ch. D. 317.

C. A. 1911

COCKRELL'S ESTATE, *In re.*

apart from any question about the sale there is no doubt that this fund has been recovered or preserved by us.

Upjohn, K.C., and *Borthwick*, for the plaintiff in the action, were not called upon to argue.

COZENS-HARDY M.R. This is an appeal from a decision of Neville J. declining to grant to solicitors a charging order on the funds in Court. The appellant's firm acted in the suit as solicitors for the surviving defendant, Mrs. Pearce, one of two executors appointed by the will. It was a creditor's action, and I am sorry to say it has been going on in Court for a very long time. The result of the accounts according to the Master's certificate was found to be that this lady was indebted to the estate in the sum of 64*l.* 9*s.* 6*d.*, being the balance due from her in respect of the real and personal estates. Throughout all these proceedings the appellant's firm acted for her, and in their presence an order was made on further consideration, the precise language of which is not before us, as the order has not yet been drawn up. In substance it was that the 64*l.* 9*s.* 6*d.* should be set off against her costs of the action, and the rest of her costs paid out of the fund. That set-off is equivalent to payment of those costs to that extent. I will test that in this way. If this lady was found to be indebted to the estate in circumstances which might make her liable to attachment under the Debtors Act, 1869, would anybody say that the 64*l.* 9*s.* 6*d.* owing from her had not been paid? The question seems to me to answer itself. And I cannot see under what other conditions the same question could receive a different answer. In my opinion, therefore, this is simply a case in which the costs have been paid to the extent of 64*l.* 9*s.* 6*d.*, and paid not without the privity of the appellants, but with their knowledge and consent, by virtue of an order in the making of which they took part.

There is another point in this case, one which I do not desire absolutely to decide, which is this. Part of the outstanding estate consisted of a share in a partnership, and the plaintiff made an application in the action for the approval by the Court of a conditional contract for sale of that share. The solicitors acting for the defendants, the executors, opposed that

application, and the Court made an order for sale by auction with the result that a slightly higher price was obtained than that fixed by the conditional contract; but the costs of the auction and advertisements and other expenses far more than swallowed up the difference, so that the transaction was not a profitable one. I greatly doubt whether it can be said that there was any property recovered or preserved under those circumstances; but however that may be, I still think that it is perfectly plain that the Court has a discretion and is not bound to make a charging order, and that in the circumstances of this case the judge was right in saying that no charging order ought to be made. It would be an unhappy time for trust estates if an executor could set off his costs against his indebtedness to the estate and his solicitors could then go behind that and claim that they were entitled to a charging order under the Act for the same costs. I decline to take that view. In my opinion the learned judge was quite right for the reasons which he gave, though I think also there may be other grounds on which the decision might be supported. The appeal must be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion, and it appears to me to be a perfectly clear case. The appellant's firm acted for the executrix and she incurred costs as such. An order was made on further consideration which allowed her her costs and directed a set-off against those costs of 64*l*. 9*s*. 6*d*. due from her to the estate and payment of the balance to her. The appellant's firm acted as her solicitors throughout. The order was equivalent to an absolute payment of the 64*l*. 9*s*. 6*d*.; the estate has lost its right to recover that sum from her. The appellant's firm were parties to the order, and now they say that in spite of it they ought to have a solicitor's lien for all their costs upon the sum allowed to the executrix for costs including the 64*l*. 9*s*. 6*d*. Assuming that this sum is a fund which the solicitors have recovered or preserved, how can they say that their client's costs to that extent have not been paid by the estate? It was only in acting for their clients that they could get their lien, and how can they say that these costs have not been paid or have been improperly paid to her when they took

C. A. 1911

COCKRELL'S ESTATE, *In re.*

part in the making of the order? I cannot understand such a contention, and in my opinion the appeal must be dismissed.

FARWELL L.J. I am of the same opinion. I agree that these costs have in fact been paid, and that, even if a solicitor's right is so high and independent as the appellant alleges, still, under the circumstances of this case, the learned judge was quite right in saying that he would not exercise his judicial discretion by making a charging order. I also share the doubt expressed by the Master of the Rolls whether we ought not to take into consideration the fact that nothing was added to the estate by the sale by auction. On the contrary there was really a serious loss occasioned to it. The Irish case *In re White* (1) was not contested or argued in any way and may even have been heard ex parte. The learned Vice-Chancellor gave no reasons; and it is difficult to see what were the grounds of the decision, but it is a decision which does not commend itself to my judgment. The appeal must be dismissed.

Solicitors: *Gribble, Oddie & Co.; Theodore Bell & Co., for Lucas & Wyllys, Great Yarmouth.*

(1) 17 L. R. Ir. 223.

H. C. R.

In re CLIFFORD.
MALLAM *v.* McFIE.

[1911 C. 1088.]

SWINFEN EADY J.
1911
Nov. 9.

Will—Specific Legacy—Definite Number of the Shares belonging to Testator in Company A—Sub-division of Shares—Will speaking from Death—Contrary Intention—Ademption—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 24.

Specific bequest of "twenty-three of the shares belonging to me in" company A.

At the date of his will the testator held 104 original 80*l.* shares.

At his death he held 416 new 20*l.* shares, each original 80*l.* share having been sub-divided into four new 20*l.* shares :—

Held, that as the bequest was a definite specific bequest of a thing that could neither be increased nor diminished by events subsequent to the will, there was a sufficient contrary intention on the face of the will to exclude s. 24 of the Wills Act, 1837, and the bequest referred to the 80*l.* shares existing at the date of the will.

Goodlad v. *Burnett* (1855) 1 K. & J. 341, 348; *In re Gibson* (1866) L. R. 2 Eq. 669, 672; and *In re Slater* [1907] 1 Ch. 665, 670, applied.

In re Gillins [1909] 1 Ch. 345 (a general legacy), distinguished.

Held, also, that as the twenty-three original shares, though changed in name and form, substantially existed in their sub-divided form, there was no ademption, but that ninety-two of the new shares passed by the specific bequest.

In re Slater [1907] 1 Ch. 665, 672, applied.

ORIGINATING SUMMONS.

By his will dated February 22, 1909, a testator, after appointing the plaintiffs his executors and trustees, made (inter alia) the following specific bequest :—"I give and bequeath to my trustees twenty-three of the shares belonging to me in the London and County Banking Company Limited" upon trust for the benefit of certain specific legatees as therein declared. The testator devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale and conversion and directed them to hold the net residue (after payment of his funeral, testamentary, and administration expenses and legacies) upon trust for certain residuary legatees.

The testator died on October 3, 1910. At the date of his will, February 22, 1909, the testator held 104 shares in the London

SWINFEN EADY J.
1911
CLIFFORD, *In re.* MALLAM *v.* MCFIE.

and County Banking Company, Limited. These were 80*l.* shares with 20*l.* paid and were then worth about 90*l.* apiece. He did not sell any of these shares after making his will, neither did he buy any more.

The capital of the London and County Banking Company, Limited, was then 8,000,000*l.* divided into 100,000 shares of 80*l.* each with 20*l.* paid. The uncalled capital was 60*l.* a share, of which the last 40*l.* was only capable of being called up in a winding-up. In August, 1909, the London and County Banking Company, Limited, acquired the business of the London and Westminster Bank, Limited, on the terms of increasing its capital by 6,000,000*l.* and issuing that new capital to the liquidators of the London and Westminster Bank, Limited, for distribution amongst its shareholders in a voluntary liquidation. This was carried out by the issue to the liquidators of the London and Westminster Bank, Limited, of 300,000 new shares of 20*l.* each, credited with 5*l.* paid. Of the uncalled liability of 15*l.* a share, the last 10*l.* could only be called up in a winding-up. The name of the London and County Banking Company, Limited, was changed to the London County and Westminster Bank, Limited.

On September 9, 1909, each of the old 80*l.* shares with 20*l.* paid was sub-divided into four new 20*l.* shares with 5*l.* paid. Of the uncalled capital of 15*l.* a share the last 10*l.* could only be called up in the event of a winding-up. Special provisions were made by which the voting power was kept unaltered. The capital of the London County and Westminster Bank, Limited, therefore became 14,000,000*l.*, divided into 700,000 shares of 20*l.* each, and prior to his death 416 of these new shares were allotted to and accepted by the testator in lieu of his 104 original shares. The testator did not sell any of these new shares, neither did he acquire any more. At the date of his death they were worth 21*l.* 5*s.* apiece.

This summons was issued to determine (inter alia) whether the above bequest of twenty-three shares belonging to the testator in the London and County Banking Company, Limited, had been adeemed, or whether it was a valid bequest of twenty-three or ninety-two or any other number of the shares belonging

to the testator in the London County and Westminster Bank, Limited.

Stainer, for the executors and trustees.

Alfred Adams, for the specific legatees. This specific bequest clearly refers to the old 80*l.* shares existing at the date of the will. Each of these is completely traced into and identified with its equivalent four new 20*l.* shares. The bequest therefore passes ninety-two new 20*l.* shares, and no case of ademption arises.

[SWINFEN EADY J. I will hear the residuary legatees.]

A. J. Spencer, for the residuary legatees. There is no contrary intention on the face of this will to exclude s. 24 of the Wills Act, 1837. The bequest therefore speaks from the testator's death and only passes twenty-three of the new shares: *In re Gillins.* (1) In that case a bequest of twenty-five shares in the Commercial Union Assurance Company, Limited, was held to pass twenty-five shares as they existed at the testator's death.

[SWINFEN EADY J. That was a general legacy.]

That is so, but the judgment was based on specific bequest authorities, which were treated as applicable. In *Goodlad* v. *Burnett* (2) a specific bequest of "my new 3¼ per cent. annuities" was held to speak from the testatrix's death, and in *In re Slater* (3) a specific bequest of "the interest arising from money invested in the Lambeth Waterworks Company" was also held to speak from the testator's death.

[SWINFEN EADY J. In those cases the bequest was capable of being increased or decreased by events subsequent to the will. In the present case there is a definite bequest of "twenty-three of the shares belonging to me." That can neither be increased nor decreased. That is the test established by *Goodlad* v. *Burnett* (2), *In re Slater* (3), and *In re Gibson.* (4)]

That test should be applied to the quality as well as to the quantity of the shares: *In re Gillins.* (1) In this case the quality might have been increased by consolidation of the shares, in which case twenty-three consolidated shares would have passed.

(1) [1909] 1 Ch. 345, 350.
(2) 1 K. & J. 341, 348.
(3) [1907] 1 Ch. 665, 670.
(4) L. R. 2 Eq. 669, 672.

SWINFEN EADY J.
1911
CLIFFORD, *In re.* MALLAM *v.* MCFIE

The quality has in fact been decreased by sub-division and only twenty-three sub-divided shares pass.

Suppose, however, that s. 24 is excluded and the specific bequest speaks from the date of the will. It must then be read as a specific bequest of twenty-three of the 80*l.* shares. In that case the bequest is adeemed, as those shares have ceased to exist, and the bequest cannot be satisfied out of the new shares: *In re Lane* (1) ; *In re Gray.* (2)

Tomlin, for parties not concerned with this point.

SWINFEN EADY J. The testator bequeathed to his trustees "twenty-three of the shares belonging to me in the London and County Banking Company Limited" upon trust for the benefit of certain legatees. At the date of his will he possessed 104 old 80*l.* shares with 20*l.* paid in the London and County Banking Company, Limited. Between his will and his death the company changed its name to "The London County and Westminster Bank, Limited." The capital was increased and new capital was issued. The old capital was sub-divided by changing each old 80*l.* share with 20*l.* paid into four new 20*l.* shares with 5*l.* paid. The testator's shares were sub-divided accordingly. It appears that he neither bought nor sold any shares between his will and his death, and at his death his holding was 416 new 20*l.* shares with 5*l.* paid instead of 104 old 80*l.* shares with 20*l.* paid.

It is manifest that neither the change of name nor the further issue of capital affected the constitution or identity of the company. The residuary legatees, however, contend that the bequest speaks from the death and only passes twenty-three new 20*l.* shares. In the alternative they contend that if the bequest speaks from the date of the will and refers to the old 80*l.* shares then existing it is adeemed, as those shares had disappeared before the testator's death.

Now s. 24 of the Wills Act, 1837, provides that "Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." Is there such a

(1) (1880) 14 Ch. D. 856. (2) (1887) 36 Ch. D. 205.

contrary intention on the face of this will? The bequest is "twenty-three of the shares belonging to me in the London and County Banking Company Limited." This is a definite bequest which is incapable of being increased or decreased by events subsequent to the will. It is not like a bequest of "my shares in the London and County Banking Company Limited." In the case of such a bequest the testator might increase or decrease his holding by purchase or sale, and the will would clearly speak from his death and pass whatever he held at that epoch. But where as in the present case the bequest is not capable of increase or decrease, and is specific, the will on the face of it shews a contrary intention within s. 24.

In *Goodlad* v. *Burnett* (1) a bequest of "my new 3¼ per cent. annuities" was held to comprise all the new 3¼ per cent. annuities that the testatrix had at her death. Wood V.-C. said: "When I refer to a particular thing, such as a ring or a horse, and bequeath it as 'my ring' or 'my horse,' it seems to me there might be considerable difficulty in saying that the 'contrary intention' to which the Act, in its 24th section refers, does not appear on the face of the will; but when a bequest is of that which is generic—of that which may be increased or diminished, then, I apprehend, the Wills Act requires something more on the face of the will for the purpose of indicating such 'contrary intention' than the mere circumstance that the subject of the bequest is designated by the pronoun 'my.'"

In *In re Slater* (2) it was held that a bequest of "the interest arising from money invested in the Lambeth Waterworks Company" spoke from the testator's death and did not pass Metropolitan Water Board stock issued to the testator as compensation for his Lambeth stock when the Lambeth Company's undertaking was taken over by the Metropolitan Water Board. In considering whether there was any intention to exclude s. 24 Cozens-Hardy M.R. applied the following test: "Let me suppose, what is quite possible, that in the interval between the date of his will and of his death the testator had purchased in the market 1000*l.* more of this very Lambeth Waterworks Company's stock, and that he had died before the

(1) 1 K. & J. 341, 348. (2) [1907] 1 Ch. 665, 670.

SWINFEN EADY J.
1911
CLIFFORD, *In re.* MALLAM v. MCFIE.

completion of the transfer of the undertaking under the scheme. It seems to me that the argument which must then have been addressed to the Court on behalf of the specific legatee, that a gift of 'my Lambeth Waterworks Company's stock' is a gift of 'the Lambeth Waterworks Company's stock which I may have at my death,' must have succeeded, and that it would have been irrelevant to consider whether the amount which the testator had at his death was greater or less than the amount which he had at the date of the will." That is an illustration of Wood V.-C.'s statement that in a bequest of "that which may be increased or diminished" the word "my" is not a sufficient indication of a contrary intention within s. 24.

In *In re Gibson* (1), on the other hand, there was a bequest of "my 1000 North British Railway Preference shares." At the date of his will the testator had 1000*l.* guaranteed stock to which the bequest would have applied. Between his will and his death he sold the 1000*l.* guaranteed stock and purchased from time to time other shares and stock in the North British Railway. Wood V.-C. held that, as the bequest related to a specific thing incapable of increase or diminution, there was a sufficient contrary intention in the word "my" to exclude the operation of s. 24. In that particular case it was held that the bequest had been adeemed, and could not be satisfied out of the North British Railway stocks and shares in the testator's possession at his death.

In the present case the bequest of "twenty-three of the shares belonging to me in the London and County Banking Company Limited" is a specific bequest of a thing incapable of increase or diminution, and there is in my opinion a sufficient contrary intention to shew that the testator meant the bequest to be construed as at the date of his will.

The residuary legatees contend that if so construed the bequest has been adeemed, as the 80*l.* shares to which it refers no longer exist. Now the question of ademption arose in *In re Slater* (2), and Cozens-Hardy M.R. stated the principle as follows: "I feel bound myself to adopt the view taken not in one case only, but in many, that you have to ask yourself, Where is the thing which is given? If you cannot find it at the testator's death, it is no

(1) L. R. 2 Eq. 669, 672. (2) [1907] 1 Ch. 665, 672.

use trying to trace it unless you can trace it in this sense, that you find something which has been changed in name and form only, but which is substantially the same thing." Here I find the twenty-three shares bequeathed by the will changed in name and form only, but substantially existing in their sub-divided form, and each original share traceable into its four sub-divided shares. The subject-matter of the bequest remains in substance, though changed in name and form. There is therefore no ademption, and ninety-two of the new shares, identical in all but name and form with the twenty-three original shares, pass by the bequest.

Solicitors: *Stow, Preston & Lyttelton, for George Mallam & Son, Oxford; Jackson & Jackson, for R. S. Wood & Co., High Wycombe.*

G. R. A.

In re LANCASHIRE PLATE GLASS, FIRE AND BURGLARY INSURANCE COMPANY, LIMITED.

[00337 of 1911.]

Company—Assurance Company—Subsidiary Company—Principal Company—Transfer of Assurance Business—Meaning—Purchase of Bulk of Shares—Appointment of Directors—Guarantee of Policies—Mutual Reinsurance Treaty—Assurance Companies Act, 1909 (9 *Edw.* 7, *c.* 49), *s.* 16.

The mere fact that assurance company A obtains complete control of assurance company B by purchasing the bulk of its shares, appointing its directors, guaranteeing its policies, and entering into a contract of mutual reinsurance does not amount to a transfer of assurance business from company B to company A so as to constitute company B a subsidiary company and company A a principal company within s. 16 of the Assurance Companies Act, 1909.

PETITION.

This was a petition to wind up the above company, hereinafter called the Lancashire Company, under the provisions of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), and the Assurance Companies Act, 1909. The petitioners were the National Provincial Insurance Corporation, Limited (in liquidation), hereinafter called the National Company.

SWINFEN EADY J.

1911

LANCASHIRE PLATE GLASS, FIRE AND BURGLARY INSURANCE COMPANY, LIMITED, *In re.*

The Lancashire Company was incorporated in May, 1903, with a capital of 5000*l.* divided into 10,000 shares of 10*s.* each. The number of shares issued was 3650, on which 6*s.* 3*d.* had been paid up.

The objects of the Lancashire Company were to carry on the business of plate glass, fire, and burglary insurance and every kind of insurance and reinsurance business except the issuing of policies of assurance upon human life, and also to sell or dispose of the undertaking of the company for such consideration as the company might think fit, and in particular for shares, debentures, or securities of any other company having objects altogether or in part similar to those of the Lancashire Company.

On June 9, 1909, a provisional agreement was entered into for the sale of the Lancashire Company's undertaking to the National Company, but this agreement was not carried out owing to the opposition of certain shareholders of the Lancashire Company. An arrangement was then made under which in 1909 and 1910 the National Company purchased the bulk of the Lancashire Company's shares from individual shareholders. They purchased 2843 shares for themselves and another 300 shares to qualify three nominees as directors of the Lancashire Company in place of the existing directors who retired. They also guaranteed the policies of the Lancashire Company and entered into a treaty of mutual reinsurance in respect of the two companies' policies. The managing director of the National Company was appointed director and chairman of the Lancashire Company, and two other directors of the National Company were appointed directors of the Lancashire Company, the old directors of the Lancashire Company retiring. The assistant secretary of the National Company became the secretary of the Lancashire Company, whose office was moved to that of the National Company.

On July 17, 1911, a petition to wind up the National Company was presented, and on August 9 a compulsory order was made.

On September 18, 1911, the National Company presented this petition, alleging (inter alia) that the Lancashire Company was a subsidiary company and the National Company a principal

company within the meaning of s. 16 of the Assurance Companies Act, 1909; that the National Company was being wound up by the Court; and that it was just and equitable that the Lancashire Company should be wound up by the Court in conjunction with the National Company.

Independently of this section they alleged that it was just and equitable that the Lancashire Company should be wound up.

The petition contained various allegations with the view of shewing that it was just and equitable that the Lancashire Company should be wound up, but the facts were not fully ascertained when the petition was presented, and having regard to the circumstances and the nature of the case disclosed at the hearing the Court only decided the question whether the Lancashire Company was a subsidiary company and ordered the rest of the petition to stand over with leave to amend and file further evidence. The facts, arguments, and judgment on this point are alone reported.

P. O. Lawrence, K.C., and *A. Guest Mathews*, for the National Company. The Lancashire Company is a subsidiary company within s. 16 of the Assurance Companies Act, 1909, which provides as follows:

Sub-s. 1. "Where the assurance business or any part of the assurance business of an assurance company has been transferred to another company under an arrangement in pursuance of which the first-mentioned company (in this section called the subsidiary company) or the creditors thereof has or have claims against the company to which such transfer was made (in this section called the principal company), then, if the principal company is being wound up by or under the supervision of the Court, the Court shall (subject as hereinafter mentioned) order the subsidiary company to be wound up in conjunction with the principal company, and may by the same or any subsequent order appoint the same person to be liquidator for the two companies, and make provision for such other matters as may seem to the Court necessary, with a view to the companies being wound up as if they were one company."

Sub-s. 4. "Where any company alleged to be subsidiary is

SWINFEN EADY J.

1911

LANCASHIRE PLATE GLASS, FIRE AND BURGLARY INSURANCE COMPANY, LIMITED, *In re.*

not in process of being wound up at the same time as the principal company to which it is subsidiary, the Court shall not direct the subsidiary company to be wound up unless, after hearing all objections (if any) that may be urged by or on behalf of the company against its being wound up, the Court is of opinion that the company is subsidiary to the principal company, and that the winding up of the company in conjunction with the principal company is just and equitable."

Sub-s. 5. "An application may be made in relation to the winding up of any subsidiary company in conjunction with a principal company by any creditor of, or person interested in, the principal or subsidiary company."

Now in a popular sense it is clear that the bulk of the Lancashire Company's business was transferred to the National Company. It was of course essential to keep the Lancashire Company on foot in order that policies might still be issued in its name and the goodwill preserved. But the business was really conducted for the benefit of the National Company, who controlled it and took the bulk of the profits. The Lancashire Company had claims for calls, and also claims under the guarantee and the treaty of mutual reinsurance. Sect. 16 is therefore applicable.

Care, *K.C.*, and *Rolt*, for the Lancashire Company. The Lancashire Company is not a subsidiary company within s. 16. There has been no transfer of business within the meaning of that section, which must be read in conjunction with ss. 13 and 14. Sect. 13 provides that an arrangement for transfer must be sanctioned by the Court. Notice of the intention to make the application to the Court must be published in the *Gazette* and the deed effecting the transfer must be open for inspection for fifteen days after that publication. Sect. 14 provides that a certified copy of the deed effecting the transfer must be deposited with the Board of Trade. It is clear, therefore, that s. 16 refers to a transfer of business in the strict sense and not in a loose popular sense. In any case, quite apart from ss. 13 and 14, it is clear that neither a purchase of shares nor a guarantee of policies nor a mutual reinsurance treaty amounts to a transfer of assurance business. Sect. 16 is therefore inapplicable.

Even if s. 16 applied the National Company would have no locus standi. It is not a person interested in the Lancashire Company under sub-s. 5.

[SWINFEN EADY J. It is a past member under a liability for calls, and it has guaranteed the policies. It is clearly a person interested.]

We do not press the point.

Chetwynd Leech, for the holders of 245 out of 265 new shares recently issued by the Lancashire Company, adopted the same arguments.

A. Guest Mathews in reply.

SWINFEN EADY J. In my opinion the petitioners have not established any case within s. 16 of the Assurance Companies Act, 1909. I cannot find that there was any transfer of assurance business. A treaty of mutual reinsurance is not a transfer of assurance business. A guarantee of policies is not a transfer of assurance business. Again the purchaser of shares in an assurance company does not acquire a transfer of any part of its assurance business, even though he obtains control of the company by acquiring the bulk of the shares and appointing the directors. Sect. 16 is therefore inapplicable, and the Lancashire Company cannot be wound up as a subsidiary company. The rest of the petition will stand over with leave to amend and file further evidence on the question whether it is just and equitable on other grounds that the Lancashire Company should be wound up under the Companies (Consolidation) Act, 1908.

Nov. 28. On the amended petition being brought on the Lancashire Company consented to a compulsory order.

Solicitors: *Sharpe, Pritchard & Co.; Hutchison & Cuff; Ralph Miller.*

G. R. A.

PARKER J.

1911

Oct. 27;
Nov. 1.

In re VAN DER LEEUW'S TRADE MARK.

Trade Mark—Matter calculated to deceive—Use of Foreign Words—Registration allowed subject to Undertaking—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 11, 12, 59.

The use of a Spanish brand name as part of a trade mark in connection with cigars may be, but is not necessarily, "calculated to deceive" within the meaning of s. 11 of the Trade Marks Act, 1905, as containing the false suggestion that the cigars are made in Havana or some Spanish-speaking country, when in fact they are made elsewhere. Each case must be judged by its own special circumstances.

In re McGlennon's Application (1908) 25 Rep. Pat. Cas. 797, distinguished.

J. J. Van der Leeuw and others, a firm of Dutch merchants, carrying on business as De Erven de Wed J. Van Nelle, of Rotterdam, had for many years imported into the United Kingdom cigars (made in Holland) in boxes marked with a label consisting of a coloured picture representing two youths in costume, one of whom was lighting his cigar from the cigar of the other. At the foot of the picture there were printed the words "Los Alumbradores," which in Spanish mean "the lighters." This label was used by the firm as their trade mark in Holland. The firm applied in England for the registration of the label as a trade mark in class 45 for tobacco manufactured or unmanufactured. The application to register was opposed before the Comptroller-General of Patents, Designs and Trade Marks by the Havana Cigar Protection Association, Limited, on the ground that the mark contained matter "calculated to deceive" within the meaning of s. 11 of the Trade Marks Act, 1905. There was no evidence that any one had been actually deceived, although a shipper of Havana cigars and a cigar importer respectively made declarations to the effect that the use of a Spanish brand name would to them suggest Havana as the country of origin. Before the Comptroller the applicants offered not to sell their cigars in this country under the label in question without branding the cigar boxes with the words "Made in Holland," and the Comptroller accepted this offer and made it a condition of registration that they should undertake to that effect. The evidence shewed that the mark had actually been used in

England for twenty-one years, during which nearly 20,000 boxes had been sold.

The Havana Cigar Protection Association, Limited appealed, under the direction of the Board of Trade, to the Court, and the appeal was heard by Parker J. on October 27, 1911.

Sebastian, for the appellants. The question is whether the mark is "calculated to deceive" within the meaning of s. 11 of the Trade Marks Act, 1905. The use of a Spanish brand name on cigars will suggest, or is likely to suggest, that the cigars are Havana cigars, or at any rate made in some Spanish-speaking country, and if this is the case the use of the label is calculated to deceive, and the label is disentitled to protection. No doubt cigars, although not made in Havana or a Spanish-speaking country, may be described, as regards size, shape, and colour, by Spanish words, as that is the custom of the trade; but the use of a Spanish brand name is not allowable. In a case like this the onus lies on the applicant for registration of the mark to shew affirmatively that it is not calculated to deceive: *Eno* v. *Dunn.* (1) An emblem denoting a certain nationality—such as a shamrock for Ireland—will not be allowed to be registered as a mark in respect of goods manufactured in a country which is not suggested by that emblem: *In re McGlennon's Application.* (2) The use of a Spanish brand in connection with British-made cigars, with a picture but without any English words or words indicating that the cigars are British, is contrary to s. 2 of the Merchandise Marks Act, 1887, as giving a false trade description: *Rex* v. *Butcher* (3); *Rex* v. *Phillips.* (4) If the mark is to be registered subject to an undertaking by its owners, the undertaking imposed by the Comptroller is insufficient. The length of time during which the respondents have used their mark will not better their case if it was originally calculated to deceive: *In re Heaton's Trade Mark.* (5) [He also referred to *Royal Warrant Holders' Association* v. *Edward Deane & Beal, Ld.* (6)]

(1) (1890) 15 App. Cas. 252.
(2) 25 Rep. Pat. Cas. 797.
(3) (1908) 24 Times L. R. 797.
(4) (1909) 25 Times L. R. 764.
(5) (1884) 27 Ch. D. 570.
(6) (1911) 28 Times L. R. 6; since reported ante, p. 10.

PARKER J. 1911 VAN DER LEEUW'S TRADE MARK, *In re.*

A. J. Walter, K.C., and *D. M. Kerly*, for the respondents. *Eno* v. *Dunn* (1) has no application to this case. The label, even by itself, is not calculated to deceive. It has been used for many years in this country, yet there is no suggestion that any one has been deceived by it. The appellants' contention amounts to saying that all Spanish brand words suggest an origin of Havana or a Spanish-speaking country, which is not the case. The undertaking is sufficient, but the respondents are willing to give any reasonable undertaking, and will even undertake not to sell the cigars in this country without branding the cigar boxes with the words "Made in Holland" of a proper size and in a certain position, and without also placing the same words legibly printed on the inside of the lid of each box.

[The appellants were willing to withdraw their opposition on this undertaking, but there being a difference as to costs, the questions raised were left for the Court's decision.]

Cur. adv. vult.

Nov. 1. PARKER J. The respondents are seeking to register as a trade mark in class 45, for tobacco manufactured or unmanufactured, a label consisting of a coloured picture representing two youths in costume, one of whom was lighting his cigar from the cigar of the other, the words "Los Alumbradores," which in Spanish mean "the lighters," being printed at the foot of the picture. The respondents are a Dutch firm, who have for many years imported into this country cigars made in Holland, marked with this label, which they also use as their trade mark in Holland.

The registration of the mark was opposed by the appellants, the Havana Cigar Protection Association, Limited, upon the ground that it is calculated to deceive within the meaning of s. 11 of the Trade Marks Act, 1905, and is therefore disentitled to protection. Their contention was overruled by the Comptroller, and they now, under the direction of the Board of Trade, appeal to the Court.

The appellants' contention amounts to this: that the use of a

(1) 15 App. Cas. 252.

Spanish brand name on cigars must suggest, or at any rate is likely to suggest, that the cigars, if not Havana cigars, are at any rate made in some Spanish-speaking country, and that in the case of cigars made in Holland this will be a false suggestion. They admit that cigars, wherever made, may be legitimately described as to size, shape, and colour, by Spanish words, for this is the common custom of the trade, but they desire to draw the line at a Spanish brand name. In my opinion no such line can properly be drawn. It is, of course, possible that a brand name may suggest the country of origin, as I think was the case in *Rex* v. *Phillips* (1), where the brand name in question was "Bella de Cuba." It is further possible that the use of a Spanish brand name coupled with the nature of the picture on which it appears, with or without the addition of other Spanish words, may suggest Havana or some other Spanish-speaking country as the country of origin of the goods. This appears to have been the case in *Rex* v. *Butcher*. (2) But it appears to me that I should be going too far if I held that every Spanish brand name for cigars made in a country where Spanish is not spoken must contain a false suggestion. If I held this, I might be throwing doubt on the propriety of many existing brand names. I might equally well hold that a French brand name for gloves or corsets made in England must necessarily be calculated to deceive.

The appellants also relied on the case of *In re McGlennon's Application* (3), in which Warrington J. refused to allow the registration of the outline of a shamrock leaf as suggesting an Irish origin for picture post-cards. On reference to that case I find that the learned judge decided entirely on the evidence before him, and was careful not to lay down any general rule, and if I remember rightly, the thistle is and has long been used as their trade mark for butterscotch and like wares by a well-known firm of English manufacturers. There can, in my opinion, be no such general rule as suggested. Each case must be judged by its own special circumstances. In the present case there is nothing in the label to help the contention that the Spanish brand name suggests the place of origin of the goods,

(1) 25 Times L. R. 764. (2) 24 Times L. R. 797.
(3) 25 Rep. Pat. Cas. 797.

PARKER J. 1911 VAN DER LEEUW'S TRADE MARK, *In re.*

and when I come to the evidence I find that the mark has actually been used in this country for twenty-one years, during which nearly 20,000 boxes have been sold, and yet there is no suggestion that any one has been actually deceived.

As against this, I have only the declarations of a shipper of Havana cigars and of a cigar importer to the effect that the use of a Spanish brand name would to them suggest Havana as the country of origin, a position which the appellants would no doubt have desired to maintain, but which they felt obliged to abandon. Before the Comptroller the respondents offered, as a proof of their bona fides, not to sell their cigars in this country under the label in question without branding the cigar boxes with the words "Made in Holland," and the Comptroller accepted this offer and made it a condition of registration that they should undertake to that effect. Before me the respondents were ready to amplify their offer and to undertake not to sell their cigars in this country without branding the cigar boxes with the words "Made in Holland" of the same size and in the same position as these words are branded on a box which was produced in Court, and without also placing the same words legibly printed on the inside of the lid of each box. The appellants were willing to withdraw their opposition on this undertaking, but both parties desired I should decide the question, because they could come to no agreement as to costs. Under these circumstances I need not consider whether such an undertaking is really necessary, and my order is that, the respondents submitting that their undertaking in the form last suggested be made a condition of registration, the motion be dismissed with costs.

Solicitors for appellants: *McKenna & Co.*
Solicitors for respondents: *Lumley & Lumley.*

F. E.

C. A.
1911
Nov. 9

In re BLADON.
DANDO *v.* PORTER.

[1911 B. 1292.]

Settled Estate—Tenant for Life and Remainderman—Freehold Licensed Premises—Compensation for Extinction of Licence—"Persons interested in the licensed premises"—Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *s.* 2.

Where licensed premises form part of a settled estate, and the licence is extinguished under the provisions of the Licensing Act, 1904, the proportion of the compensation allocated to the freeholder of the premises represents capital money of the estate.

Decision of Neville J. [1911] 2 Ch. 350, affirmed.

Semble, the question could not properly be raised upon originating summons.

Appeal from a decision of Neville J. (1)

James Bladon by his will, dated February 17, 1874, gave and bequeathed to his wife, Harriet Bladon, "the whole of his estate and effects" for her life, and after her death to the plaintiff John Dando; and the testator, after bequeathing an annuity, proceeded: "After the death of my said dear wife the said effects bequeathed to her by this will shall be given to such of her relations as she may appoint in writing for that purpose." And the testator appointed his wife and Andrew Hair to be his executors.

The testator died on February 27, 1874, and his will was proved by both the executors.

Harriet Bladon subsequently married Isaac Dando, by whom she had a daughter and two sons, all of whom attained the age of twenty-one. Andrew Hair died in 1900. Harriet Dando survived her second husband, and by her will, dated June 18, 1907, after appointing her daughter Harriet Porter and Henry Thomas to be her executors, appointed and directed that all her estate and interest under the will of James Bladon should be held in trust for her children.

Harriet Dando died in February, 1911, and her will was proved by her daughter Harriet Porter alone, Henry Thomas having renounced probate.

Part of the real estate of James Bladon consisted of a freehold

(1) [1911] 2 Ch. 350.

C. A. 1911

BLADON, *In re.* DANDO *v.* PORTER

public-house which was let upon lease. In 1907 the licence of the house was extinguished under the provisions of the Licensing Act, 1904 (1), and 450*l.*, the proportion of the compensation allocated to the freeholder, was paid over to Harriet Dando.

Upon a summons taken out by John Dando, the remainderman, to have it determined whether the 450*l.* formed part of Harriet Dando's estate, or whether he was beneficially entitled to it as forming part of the real estate of the testator, James Bladon, Neville J. held that the sum in question represented capital moneys of the estate.

The executrix of Harriet Dando appealed.

Cave, K.C., and *W. H. Gover*, for the appellant. This money belongs to the estate of the tenant for life to whom it was paid over. There is nothing in the Licensing Act to take it away from her. If this compensation be treated as insurance moneys, then, the premiums having been paid by the tenant for life, who was bound to pay them under the Act, the policy moneys belong to her estate. The tenant for life was not obliged to keep up the licence and might have allowed it to lapse without penalty: *In re Quicke's Trusts.* (2)

[COZENS-HARDY M.R. Ought this to be dealt with upon an originating summons?]

(1) The Licensing Act, 1904, provides as follows:—

Sect. 2: "(1.) Where quarter sessions refuse the renewal of an existing on licence under this Act, a sum equal to the difference between the value of the licensed premises (calculated as if the licence were subject to the same conditions of renewal as were applicable immediately before the passing of this Act and including in that value the amount of any depreciation of trade fixtures arising by reason of the refusal to renew the licence) and the value which those premises would bear if they were not licensed premises, shall be paid as compensation to the persons interested in the licensed premises.

"(2.) The amount to be paid shall if an amount is agreed upon by the persons appearing to quarter sessions to be interested in the licensed premises and is approved by quarter sessions, be that amount, and in default of such agreement and approval shall be determined by the Commissioners of Inland Revenue in the same manner and subject to the like appeal to the High Court as on the valuation of an estate for the purpose of estate duty, and in any event the amount shall be divided amongst the persons interested in the licensed premises (including the holder of the licence) in such shares as may be determined by quarter sessions."

(2) [1908] 1 Ch. 887.

The parties are desirous of having the question decided upon this appeal.

Peterson, K.C., and *Percy Wheeler*, for the respondent, were not called upon.

COZENS-HARDY M.R. This is an appeal from a decision of Neville J., who has held that a sum payable by way of compensation in respect of the extinction of the licence of a public-house could not be retained by the tenant for life of a settled estate of which it formed part. The compensation actually paid was a larger sum than that which is in issue here, and it was decided I think by the quarter sessions that so much should go to the licence-holder, so much should go to the lessees, and the balance, which is the sum in question, to the owner of the freehold. The tenant for life in possession received that balance. I desire to say at once, to make it quite clear, that we are only deciding this question on originating summons by consent of the parties: all we are doing is to say whether, in proper proceedings taken before a proper tribunal, the persons interested in the capital could have said to the tenant for life "You have received this money as trustee for us and you are only entitled to the income of it for life and then it goes to us."

Now the question turns entirely, in my view, upon the provisions of sub-s. 1 of s. 2 of the Licensing Act, 1904. [The Master of the Rolls read sub-ss. 1 and 2 of the section, and continued:] It is quite clear that the remainderman was interested in the licensed premises. There is a subsequent provision, which I do not read in detail, under which the quarter sessions, if they feel any difficulty, can refer it to a county court judge. Now this is a statutory fund, the division of which is regulated by statute, and in my view it makes no difference at all—it is an irrelevant consideration—that the premiums on a policy against the loss of a licence, an insurance fund as it is called against the loss of the licence, are to be paid by the tenant for life of the estate and not out of capital. In the same Act it is provided that the compensation money when payable is to be paid as compensation to the person interested in the licensed premises. In my opinion, the tenant for life was not entitled to receive this

C. A. 1911

BLADON, *In re.* DANDO *v.* PORTER.

sum, which is the apportioned part of the entire compensation, as and for her own moneys, but she was only entitled to receive the income of it during her life, and on her death it was to be accounted for by her estate to the remainderman.

FLETCHER MOULTON L.J. I am of the same opinion. It is clear that the remainderman is a person interested in the licensed premises. The statute provides that the amount of compensation shall be divided among those interested, and it intends that the division should be made at the quarter sessions, unless in certain difficult cases it is referred to a county court judge. The consequence is that the remainderman in this case was entitled to a share of this compensation, to be determined by quarter sessions, but the tenant for life, as representing the owners of the totality of the estate, accepted and received this sum of 450*l*. I have no doubt, and we are bound to take it so, that she received it as trustee for those who were interested in the totality of the estate; and that being so, we are dividing it in the way in which it ought to be divided under such circumstances. In my opinion, the intention of the Act was that what we are doing now should be done at the time by quarter sessions, but it was not so done, and the consequence is we must divide it according to the rules of equity.

FARWELL L.J. I am of the same opinion. In this particular case the widow received, and I suppose invested and retained the income of, the whole sum paid to her, and as she did so no question arises as to whether there should or should not be a division of the corpus by paying over to her the value of her life interest. Whether that should or should not be done in cases where there is a life tenant and remainderman will have to be considered when the cases arise.

Solicitors for appellant: *W. J. & E. H. Tremellen, for H. J. Thomas, Cardiff.*

Solicitors for respondent: *Kinch & Richardson, for Lyndon Moore & Cooper, Newport, Mon.*

G. A. S.

In re RICHARDS.

PARKER J.

1911

Nov. 3, 10.

[1910 R. 930.]

Solicitor—Costs—Taxation—Disbursements inserted in Bill by Error—One-sixth Rule—Special Certificate—Court's Discretion as to Costs of Taxation—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 37.

Where the effect of a taxation of a bill of costs under s. 37 of the Solicitors Act, 1843, is to reduce the bill by a sixth part or more of the total amount, and the taxing Master certifies specially any circumstances relating to the bill or taxation, the discretion of the Court to make an order as to the costs of the taxation not in accordance with the one-sixth rule may be exercised in favour of either the solicitor or the client.

In his bill of costs as delivered a solicitor entered in the disbursements column certain counsel's fees. These fees had been paid by cheques of the client, but the cheques had been returned by counsel to the solicitor, who had sent them back to the client. In one instance there was a note in the bill that the cheque had been returned by counsel, but in no case was the client credited with the amount in the bill, although in a cash account delivered with the bill the amounts were all credited to the client. The result of the taxation was that a little more than one-sixth of the total amount of the bill was taxed off, and the taxing officer taxed the costs of the reference payable to the client, but specially certified the circumstances and stated that if he had been at liberty to strike out the counsel's fees the effect would have been that less than one-sixth would have been taxed off. The insertion of the fees was by a blunder of the solicitor or his clerk. The solicitor applied, on the special circumstances certified, that the taxing Master should be directed to tax the costs of the taxation payable to the solicitor instead of to the client, and that the certificate should be varied accordingly:—

Held, that the costs of the taxation must be borne by the client, but that the solicitor must pay the costs of the client of the application to the Court, as between solicitor and client.

On an originating summons taken out by Catherine Wood Mason and Elizabeth Wood Mason against Mr. H. Powell Richards, their solicitor, an order was made in chambers on July 4, 1910, that the solicitor should within seven days after service deliver to the applicants or their solicitors a bill of fees and disbursements in all suits, causes, actions, and other matters of business in which he had been employed as the applicants' solicitor, and that it should be referred to the taxing Master to tax and settle the said bill, and that the applicants and the

BIBL. LONDIN UNIV.

PARKER J. 1911 RICHARDS, *In re.*

solicitor should produce on oath before the Master as he should direct the books, &c., and otherwise as in the usual form. (1)

In obedience to this order the solicitor delivered his bill of costs for sums amounting in the aggregate to 334*l.* 6*s.* 9*d.* In this bill certain counsel's fees were included. Briefs had been delivered to counsel with the clients' cheques for the fees, but the briefs and cheques had been returned by counsel, and the cheques had been returned to the clients. The bill contained two columns of figures, one for disbursements and the other for costs. In the former margin the fees to counsel were inserted; but no credit was given in the bill for the amounts of the clients' cheques, although in one instance there was a note that counsel "returned brief and cheque."

With the bill of costs the solicitor sent in a cash account on the credit side of which there were entries of the amounts paid by the clients, including all counsel's fees paid by them, while on the debit side of the account they were charged with the amount of the bill of costs and the amount of counsel's fees returned to the clients. These returned fees amounted to 21*l.* 4*s.*

The taxing Master in his certificate stated that the bill of costs and disbursements amounted to 335*l.* 12*s.* 1*d.* (of which 88*l.* 6*s.* 5*d.* was for disbursements and 247*l.* 5*s.* 8*d.* for costs), which he had taxed at 263*l.* 18*s.* 3*d.* (the amount taxed off being therefore 71*l.* 13*s.* 10*d.* and more than one-sixth of the total bill). He also found that certain sums had been received by the solicitor, and that he had paid the clients 21*l.* 4*s.* (the returned counsel's fees). The certificate also stated that, the bill as taxed being less by a sixth part than the bill as delivered, the taxing Master had taxed the clients their costs of the reference at 46*l.* 8*s.* 2*d.* The certificate concluded as follows: "And in pursuance of the liberty given to the taxing officer by s. 37 of the Act 6 & 7 Vict. c. 73, I certify specially the following circumstances relating to the said bill and taxation, namely, that the said bill as delivered contained fees paid to counsel amounting to 21*l.* 4*s.*, which I have been compelled to tax off as unvouched because they were in fact returned by counsel and I was unable to alter the delivered bill. Had I been at liberty to

(1) See Seton on Judgments, 6th ed. vol. i. p. 268.

strike out these fees from the bill the effect would have been that the bill as delivered would have amounted only to 314*l.* 8*s.* 1*d.* and the amount taxed off to 50*l.* 9*s.* 10*d.* only, being less than one-sixth of such bill, and the costs of taxation would be payable by the clients and not by the solicitor." (1)

The solicitor took out a summons asking that upon the special circumstances certified by the taxing Master the time for payment of the amount found due might be extended until twenty-one days after the taxation thereinafter mentioned, and that the taxing Master should be directed to tax the costs of the solicitor of the application to tax and reference to taxation and to add the amount of such costs when taxed to the sum in the certificate found to be due to the solicitor in respect of his bill of costs, and that the certificate might be varied accordingly, and that the certificate should be referred back to the taxing Master for reconsideration thereof, and that upon such reconsideration he might be at liberty for the purposes of the taxation ordered on July 4, 1910, to strike out from the bill of costs the fees amounting to 21*l.* 4*s.* and to take the bill as delivered at the amount of 314*l.* 18*s.* 1*d.*, and that the certificate might be varied or discharged by omitting therefrom all reference to the costs of the applicants of the reference to taxation and all reference to the sum in the certificate stated to be due to the solicitor, and in lieu thereof that the taxing Master might certify the amount due to the solicitor in respect of the bill of costs together with the costs of the application and the reference to taxation.

The summons was adjourned into Court and heard by Parker J. on November 3 and November 10, 1911. After the

(1) By s. 37 of the Solicitors Act, 1843 (6 & 7 Vict. c. 73), it is provided that "the costs of such reference shall, except as hereinafter provided for, be paid according to the event of such taxation; that is to say, if such bill when taxed be less by a sixth part than the bill delivered, sent, or left, then such . . . . solicitor . . . . shall pay such costs; and if such bill when taxed shall not be less by a sixth part than the bill delivered, sent, or left, then the party chargeable with such bill . . . . shall pay such costs . . . . Provided . . . . that such [taxing] officer shall in all cases be at liberty to certify specially any circumstances relating to such bill or taxation, and the Court or judge shall be at liberty to make thereupon any such order as such Court or judge may think right respecting the payment of the costs of such taxation."

PARKER J. 1911 RICHARDS, *In re.*

first day's argument, his Lordship, with the consent of the parties, spoke to the taxing Master about the matter, and was told by him that the insertion of the counsel's fees in the bill was by a blunder of the solicitor or his clerk.

C. Johnston Edwards, for the summons. It is not fair that a solicitor should be saddled with the costs of the reference simply because he has by mistake inserted in his bill an item for counsel's fees which ought to have been omitted. There is no suggestion of bad faith; the entry of these fees itself contains the statement that they had been returned, so no attempt to charge the client with them could have been made. Under s. 37 of the Solicitors Act, 1843, the Court has a discretion, which, in consideration of the special circumstances certified by the Master, should be exercised by giving us the costs of the reference. It was simply a blunder appearing on the face of the bill, and the Master would have altered the bill if he had been able to do so.

T. B. Napier, for the clients. The applicant ought only to have put in his bill items which he was entitled to call upon us to pay: *Sadd* v. *Griffin*. (1) He ought not to enter a fee which has been paid by the client's cheque. The taxing Master had no power to alter the bill: *In re Grant, Bulcraig & Co.* (2); *In re Catlin*. (3) The Court will not in the exercise of its discretion alter the bill in such a way as to affect the incidence of costs. If this item is left out altogether the result will be that less than one-sixth will have been taxed off the bill and we shall have to pay the costs of the reference. The Court will not make such an alteration as that: *In re Carthew*. (4) Whether this item ought to have been in the bill or not, it is there, and the applicant cannot alter it himself: *In re Whalley* (5); *In re Thompson*. (6) Assuming, which we do not admit, that it was inserted by mistake, it has been taxed off, and the costs should be governed by that. If we had not known that it would be taxed off we should not have taxed the bill at all: *In re Blakesley and*

(1) [1908] 2 K. B. 510.
(2) [1906] 1 Ch. 124.
(3) (1854) 18 Beav. 508, 519.
(4) (1884) 27 Ch. D. 485.
(5) (1855) 20 Beav. 576.
(6) (1885) 30 Ch. D. 441.

Beswick. (1) Mistake is not a special circumstance which can be certified by the Master. The Court will not exercise its discretion in favour of the solicitor. "There is an unbroken line of authorities since the passing of the Act which establishes that, for the purposes of taxation under the Act, and the costs thereof, the solicitor is bound by the bill," and the only way in which the solicitor can add or strike out an item or items, or increase amounts, is by special application to the Court as was done in *In re Walters* (2) and *In re Whalley* (3); but such alteration is not allowed to affect the costs of taxation of the original bill: per Farwell J. in *In re Grant, Bulcraig & Co.* (4)

C. Johnston Edwards, in reply, referred to *In re Shilson, Coode & Co.* (5)

PARKER J. In this case the result of the taxation has been to reduce the solicitor's bill as delivered by more than one-sixth part, and the solicitor is therefore liable under s. 37 of 6 & 7 Vict. c. 73 to pay the clients' costs of taxation, unless the Court shall order otherwise under circumstances specially certified by the taxing Master, for in my opinion the discretion conferred on the Court when the taxing Master certifies special circumstances can, notwithstanding the argument addressed to me on the subject, be exercised in favour of the solicitor as well as of the client.

The special circumstances which the taxing Master has certified are these. The bill contains certain items for counsel's briefs and consultation. The briefs in question were originally delivered with the clients' cheques for the fees. The taxing Master was of opinion, and it was not disputed before me, that the proper course under these circumstances is for the solicitor to charge the fees in his bill of costs, giving the client credit for the amount in the cash account. The briefs and accompanying cheques were, however, returned by counsel to the solicitor, and the solicitor in his turn sent the cheques back to the clients. Under these circumstances the cash account, in which the clients were credited with

(1) (1863) 32 Beav. 379.
(2) (1845) 9 Beav. 299.
(3) 20 Beav. 576.
(4) [1906] 1 Ch. 124, 127, 128.
(5) [1904] 1 Ch. 837.

PARKER J. 1911 RICHARDS, *In re.*

the amount of the fees, was, it appears to me, properly set right by corresponding entries on the other side. In preparing his bill of costs the solicitor appears to have placed the amount of the fees in the disbursement column, though in one case he added a note explaining that they had been returned by counsel, and in both cases it was apparent on the face of the cash account delivered with the bill, that they had been so returned. The proper course would, I think, have been to shew the fees in an inner margin and not set them out in the disbursement column, but by reason of their being carried out in the disbursement column, they went to swell the total amount of the delivered bill. There was clearly no intention to conceal the fact that the fees had been returned, for any one comparing the bill with the cash account would at once discover the mistake. With the consent of both parties I have spoken to the taxing Master, and he tells me that in his opinion the carrying out of the fees in the disbursement column was simply due to a blunder on the part of the solicitor or the clerk responsible for the preparation of the bill, and not to any want of bona fides or any desire to conceal the true facts. The taxing Master, however, had of course no option in the matter. He was under the circumstances obliged to disallow the amount of these fees, and the result is that unless I exercise my discretion the solicitor will under the Act bear the whole costs of taxation, which but for the blunder would have fallen on the clients. In my opinion it would be inequitable to allow the clients to take advantage of a blunder which was apparent on the face of the bill and cash account. They cannot fairly say they proceeded to taxation because of this blunder, unless indeed they first pointed it out to the solicitor and asked that it might be corrected, and this they failed to do. There have been cited to me various cases which lay down the general rule that after his bill has been delivered a solicitor cannot alter the bill in such a manner as to reduce the charges made without submitting to conditions as to the costs of taxation; and that is a reasonable and uniform rule of the Courts. But I do not think that rule was intended, nor in my judgment ought it, to interfere with the discretion of the Court when the taxing Master has specially certified the circumstances. The Court has

in such a case a general power to vary the ordinary statutory rule, and where it is inequitable in the special circumstances certified that the statutory rule should be applied, the Court should exercise its discretion in favour of the solicitor or the client as the case may be.

In my opinion, the proper course is to direct that the costs of taxation be borne by the client, but having regard to the fact that extra costs have been incurred owing to the blunder of the solicitor, and as the solicitor is asking for relief, the proper course is to give the clients their costs of this application as between solicitor and client and allow them to set off these costs against the costs of the taxation given to the solicitor.

Solicitor for applicant: *H. Powell Richards.*
Solicitors for respondents: *Lidiard, Son & Baker.*

F. E.

In re SIR S. M. MARYON-WILSON'S ESTATE.

[1911 M. 245.]

Trustees—Investment—Stock or Securities of any "British Colony or Dependency"—Stock of Provinces of Canada—Meanings of "Colony" and "Dependency"—Colonial Stock Act, 1900 (63 & 64 *Vict. c.* 62).

Trustees cannot, under a power to invest in stocks or securities of any "British colony or dependency," invest in the stocks of any province of the Dominion of Canada, unless that province has complied with the requirements of the Colonial Stock Act, 1900—at any rate if the stock was issued after the province was merged in the Dominion of Canada.

Per Cozens-Hardy M.R.: The investment might be made in the stock of a province—such as Ontario, Quebec, Nova Scotia, or British Columbia—which was a colony before it was merged in the Dominion of Canada, if the stock was issued before the colony was so merged.

A part of a colony, or a part of a dependency, is not itself a colony or dependency. "Dependency" is a wider term than "colony," but its exact meaning has not yet been judicially determined. Canada, however, is a colony or dependency.

Per Cozens-Hardy M.R. and Farwell L.J.: Clauses in trust instruments enlarging the power of investment beyond what the general law sanctions ought to be construed strictly.

Observations as to interpreting trust instruments by the light of statutory definitions.

By the will, dated August 1, 1896, of Sir Spencer Maryon

C. A. 1911 — MARYON-WILSON'S ESTATE, *In re.*

Maryon-Wilson, Bart. (who died on December 31, 1897), power was given to invest capital moneys arising under the Settled Land Acts in any of the following investments (as well as investments for the time being authorized by any general public Act), that is to say:—"In the stocks or securities (not payable to bearer) of the Government of India for the time being or of any British colony or dependency."

The tenant for life in possession desired the trustees to invest a sum representing capital moneys arising under the Settled Land Acts in some or one of certain stocks, including stocks of the provinces of Ontario, Quebec, Nova Scotia, British Columbia, Manitoba, and Saskatchewan, all in the Dominion of Canada.

The trustees were willing to make the investments if they had power to do so, and by originating summons they asked for the Court's direction whether, as trustees, they were justified in making the investments or any of them.

The provinces in question had not complied with the requirements of the Colonial Stock Act, 1900 (63 & 64 Vict. c. 62), as regards making certain stocks authorized trustees' investments.

Eve J. held that the provinces in question were not either colonies or dependencies, and that the trustees were not authorized to invest in any of the provincial stocks. (1)

The tenant for life appealed, and the appeal was heard on October 30 and 31, 1911.

P. O. Lawrence, K.C., and *W. M. Cann*, for the appellant. The whole point is whether certain provinces of Canada are or are not colonies or dependencies within the meaning of this will. We submit that a colony is none the less a colony because it has been federated with other colonies for certain purposes.

The securities which, the appellant says, are within the investment clause are those of six provinces, namely, Ontario, Quebec, Nova Scotia, British Columbia, Manitoba, and Saskatchewan. The same considerations may not apply to all these provinces, and it is necessary to make some inquiry into their respective histories.

(1) [1911] 2 Ch. 58.

Ontario and Quebec formed parts of Old Canada. Canada was discovered by Sebastian Cabot in 1497, and soon after 1500 the French took possession of it. Quebec was founded in 1608, and in 1759 surrendered to General Wolfe. In 1763 all Canada as it then was (including Quebec and what is now Ontario) was ceded to England under the Treaty of Paris, and in 1791, under the authority of the Act 31 Geo. 3, c. 31, Canada as it then was was divided into Upper Canada, now Ontario, and Lower Canada, now Quebec. Each of these colonies was then made a separate province, with a separate constitution. Certain frictions arose after this, which continued for about forty years or more, and then Lord Durham was sent out by the British Government, and, as the result of his report, the Act 3 & 4 Vict. c. 35 was passed, by which Ontario and Quebec, then called Upper and Lower Canada, were reunited under the name of "the Province of Canada" (s. 1), with one constitution (ss. 3, 5, 6). By the British North America Act, 1867 (30 Vict. c. 3), the Crown was empowered to form the provinces of Canada, Nova Scotia, and New Brunswick into one Dominion, under the name of Canada (s. 3), which was to be divided into four provinces, named Ontario, Quebec, Nova Scotia, and New Brunswick (s. 5). The effect of this Act in many respects is stated in *Liquidators of Maritime Bank of Canada* v. *Receiver-General of New Brunswick*. (1)

Nova Scotia has had a chequered career. As a French colony it was founded about the end of the sixteenth century. In 1621, James I. made a grant of it to Sir William Alexander. Afterwards it was restored to France, but was ceded to England in 1713 by the Treaty of Utrecht. Questions were raised whether Nova Scotia only included the peninsula or included New Brunswick, and the quarrel went on until the Treaty of Paris in 1763. In 1758 a separate constitution was given to Nova Scotia, which, according to the English contention, included New Brunswick. In 1784 New Brunswick was separated from Nova Scotia, and in 1819 Cape Breton and Nova Scotia were united, and New Brunswick was left a separate colony. From 1819 Nova Scotia was also a separate colony.

(1) [1892] A. C. 437.

C. A. 1911

MARYON-WILSON'S ESTATE, *In re.*

[FLETCHER MOULTON L.J. You say that Nova Scotia was united in 1867?]

Yes; by s. 3 of the Act of 1867, and by s. 146 of the same Act the Crown was empowered in certain circumstances to admit "the colonies or provinces of Newfoundland, Prince Edward Island, and British Columbia" into the Union. British Columbia formed part of Hudson's Bay Territory and was made a Crown colony in 1858, and by the Act 21 & 22 Vict. c. 99 the Crown was empowered to appoint a Governor of British Columbia and make laws for its government (s. 2), and certain existing statutory provisions were made inapplicable to that Colony (s. 4); provision was made for appeals to the Sovereign in Council (s. 5), and for including Vancouver's Island in British Columbia (s. 6). By the British Columbia Act, 1866 (29 & 30 Vict. c. 67), s. 3, it is provided that "from and immediately after the proclamation of this Act by the Governor of British Columbia, the Colony of Vancouver Island shall be and the same is hereby united with the Colony of British Columbia, and thenceforth those two Colonies shall form and be one Colony." In 1871 British Columbia entered the Canadian Confederation.

There can, therefore, be no doubt that Ontario, Quebec, Nova Scotia, and British Columbia, at all events, have been separate colonies.

Manitoba and Saskatchewan both formed parts of the North-West Territory. Manitoba was made a province of Canada by or under a Canadian Act, 33 Vict. c. 3, s. 1. By the British North America Act, 1871 (34 & 35 Vict. c. 28), the Parliament of Canada was empowered by the Imperial Legislature to establish new provinces in any territories forming part of the Dominion, but not included in any province. By a Canadian Act, the Saskatchewan Act, 1905 (4 & 5 Edw. 7, c. 42), s. 2, Saskatchewan was made a province of Canada. Neither of these two provinces was primarily a colony in the strict sense of the word, but belonged to the Hudson Bay Company, but it is submitted that if they were not colonies they were dependencies.

[FLETCHER MOULTON L.J. In order that the stocks may be within the investment clause, the issuing body must be a colony or dependency.]

We submit that these stocks are all issued by colonies or dependencies. Colony is defined as "a settlement in a foreign country possessed and cultivated, either wholly or partially, by immigrants and their descendants, who have a political connection with and subordination to the mother-country, whence they emigrated. In other words, it is a place peopled from some more ancient city or country": Wharton's Law Lexicon, 11th ed. p. 189. Statutory definitions have no bearing on the construction of a will.

[COZENS-HARDY M.R. I am not so sure of that.]

The words of this clause are practically the same as those in Davidson's Conveyancing, vol. iv. 2nd ed. p. 33, namely, in the stocks, &c., of "India or any other colony or dependency of the United Kingdom." In Key and Elphinstone's Conveyancing, 9th ed. vol. ii. p. 526, the power is to invest in "the public stocks or funds or Government securities of the United Kingdom or India or any British colony or dependency." In Webster's Dictionary "colony" is defined as "(1.) a company of people transplanted from their mother country to a remote province or country, and remaining subject to the jurisdiction of the parent state, as the British colonies in America; (2.) the district or country colonized; a settlement; (3.) a company of persons from the same country sojourning in a foreign city or land, as, the American colony in Paris."

To hold that the testator meant a "colony" as defined by statute would be too narrow a construction, and moreover the statutory definitions are not all the same. The Colonial Stock Act, 1877 (40 & 41 Vict. c. 59), s. 26, defines "colony" as meaning in that Act "any dominion, colony, island, territory, province, or settlement situate within Her Majesty's dominions, but not within the United Kingdom, the Channel Islands, or Isle of Man, and not forming part of India as defined for the purposes of" certain other Acts, and a province under a local Legislature is to be "deemed to be a colony." By s. 2 of the Medical Act Amendment Act, 1868 (31 Vict. c. 29), "colony is to include all of Her Majesty's possessions abroad in which there shall exist a Legislature as hereinafter defined, except the Channel Islands and the Isle of Man." By s. 18 of

C. A. 1911

MARYON-WILSON'S ESTATE, *In re.*

the Interpretation Act, 1889 (52 & 53 Vict. c. 63), in that Act and Acts subsequently passed the expression "colony" is to mean "any part of Her Majesty's dominions exclusive of the British Islands, and of British India, and where parts of such dominions are under both a central and a local Legislature, all parts under the central Legislature shall, for the purposes of this definition, be deemed to be one colony." But it was never intended that this definition should be a means of interpreting wills. A more elastic meaning should be given to the word when occurring in wills.

No statutory definition of "colony" applies, and the words of the will are wide enough to include all these stocks. Provinces are none the less colonies because they have been united into a dominion.

"Dependency" is a much vaguer and wider term than "colony."

As regards "dependency," Webster's Dictionary defines it as "a territory remote from the kingdom or state to which it belongs, but subject to its dominion; a colony; as Great Britain has its dependencies in Asia, Africa, and America."

[FARWELL L.J. In Lord Halsbury's Laws of England, vol. x. p. 503, it is said that "the expression 'dependencies' is used to signify places which have not been formally annexed to the British dominions, and are therefore, strictly speaking, foreign territories, but which are practically governed by Great Britain, and by her represented in any relations that may arise towards other foreign countries. Most of them are 'protectorates,' that is, territories placed under the protection of the British Sovereign, generally by treaty with the native rulers or chiefs."]

Canada may be described as a dependency, and part of a dependency may be a colony.

[They also referred to the Federal Council of Australasia Act, 1885 (48 & 49 Vict. c. 60), s. 1; the Commonwealth of Australia Constitution Act, 1900 (63 & 64 Vict. c. 12), ss. 3, 6; and the Act 3 & 4 Vict. c. 62, and

Their Lordships thanked the appellant's counsel for the assistance given to the Court by their very able argument.]

S. Leeke, for the trustees of the will. The trustees have no wish to oppose the tenant for life as regards the investment of the funds, but they wish to be guided by the Court as to the power of investment which they possess.

[COZENS-HARDY M.R. Their application was perfectly justified.]

There may be a distinction between the stocks of Ontario, Quebec, Nova Scotia, and British Columbia on the one hand, and those of Manitoba and Saskatchewan on the other. The first four have at times been British colonies, but the other two have not. It is, however, submitted that none of the proposed stocks are authorized by the will. If the provinces are dependencies, municipalities and county councils may be dependencies. The description of "dependency" in Lord Halsbury's Laws of England would probably include both Egypt and Cyprus, but it would be dangerous to hold that trustees, under such a will as this, could invest in the securities of territories of that kind. A wide interpretation ought not to be given to an investment clause like this.

[COZENS-HARDY M.R. None of us doubt that the clause authorizes investments in stock of the Dominion of Canada.

FLETCHER MOULTON L.J. Or the stock of federated governments.

FARWELL L.J. Or the stock of provinces which have complied with the requirements of the Colonial Stock Acts.]

The testator did not intend to put a different meaning on his investment clause than that which it bore when Mr. Davidson's work appeared. If any statutory definition is to be taken in construing the clause, it is that which is contained in s. 18 of the Interpretation Act, 1889. [He also referred to s. 34 of the Companies (Consolidation) Act, 1908.]

Cur. adv. vult.

Nov. 8. COZENS-HARDY M.R. The question in this appeal is whether a power contained in a will, dated in August, 1896, to invest capital money in the stocks or securities (not payable to bearer) of "any British colony or dependency" authorizes an investment in stocks issued by six of the provinces of the

C. A. 1911

MARYON-WILSON'S ESTATE, *In re.*

Cozens-Hardy M.R.

Canadian Dominion. Eve J. has answered the question in the negative, and I think he was right. But it is proper that I should state shortly the grounds of my decision.

The word "colony" is defined in various Acts of Parliament to which our attention has been called, but only for the purposes of those Acts. The definitions are not uniform, and I doubt whether much assistance can be derived from them. The Interpretation Act, 1889, contains a definition of the word "colony" in any subsequent Act of Parliament unless the contrary appears. That definition is against the appellant, and would not include the provinces of Canada. But of course the definition has no direct application to a will. The dictionaries to which our attention has been called do not help us.

As to the word "dependency," no light has been thrown upon its meaning. Upon the whole, I think it is a wider word than "colony," and might properly be applied to the Dominion of Canada. But I do not think a part of a dependency can be a colony. If Canada is not a dependency it may be a colony, but a part of a colony is not itself a colony.

To take the particular instances, I do not think Manitoba or Saskatchewan can properly be called either a colony or a dependency. It is true that Nova Scotia, Ontario, Quebec, and British Columbia were once colonies, but for many years they have lost the status of a colony and have become merged in the Dominion. They are neither better nor worse than those provinces which never had the status of a colony. I do not forget that each province is a separate entity and has a separate Legislature.

To avoid misapprehension, I wish to add that my decision would not apply to stock issued by any of the colonies before they were merged in the Dominion. No such question arises here.

It was argued that the decision of Eve J. would have a serious effect upon the financial position of the provinces. The answer is simple. If they elect to take advantage of the Colonial Stock Act, 1900, no difficulty will arise. They are colonies within the definition of that Act. Their securities will at once become authorized securities.

A clause of this nature, enlarging the power of investment

beyond what the general law sanctions, ought, I think, to be construed strictly. It is for those who seek to include a particular investment to prove beyond all reasonable doubt that the words of the clause cover it. In the present case I am not satisfied that the provinces of the Dominion of Canada are either colonies or dependencies.

In my opinion the appeal must be dismissed.

FLETCHER MOULTON L.J. In this case the testator left property to trustees for distribution, and gave to the trustees, in addition to the ordinary trustees' statutory powers of investment, the power to invest the moneys of the trust in stocks of the Government of India for the time being or of any British colony or dependency. The trustees by this summons ask in substance whether that authorizes investment in the stocks issued by provinces of the Dominion of Canada.

It is impossible to doubt that the phrase "British colony or dependency" is one of very uncertain meaning. An attempt was made to guide us in its interpretation by the suggestion that, as it is found in recognized books of Conveyancing Precedents from about 1860 onwards, it ought to be treated as a term of art with a traditional meaning. Apart from the fact that I think it would be impossible to arrive with any certainty at any such traditional meaning, I am of opinion that such a mode of interpretation would be illegitimate. British colonies and dependencies do not remain unchanged, and the interpretation of the phrase must change with them. There are, however, some general considerations which may give us valuable guidance in this matter. In the first place, it is clear that the colony or dependency must be what I may term a "stock-issuing entity." The phrase does not mean simply that the stock is connected with British territory. Indeed it is evident that the whole purpose of the limitation is to secure that the body issuing it shall be of good credit. It follows, therefore, that we must regard the phrase as descriptive of the body issuing the stock, and it must, therefore, be the stock of an entire colony or dependency, whatever these phrases may mean. The stock of a part of a colony or of a part of a dependency is clearly not that which is

C. A. 1911

MARYON-WILSON'S ESTATE, *In re.*

Fletcher Moulton L.J.

pointed out by the limitation. This is a valuable guide, because it may well be that parts of British colonies are entitled to issue stock, just as the county councils of England are enabled to do by our statutes. No such stock can be included in the permitted list. Unless the issuing body is the whole of a colony or the whole of a dependency, its stocks are not eligible for investment under this will.

The next consideration is, that we may not use, for the interpretation of this phrase, any of the statutory definitions of colonies which appear in the interpretation clauses of Acts relating to British possessions, nor even that to be found in the Interpretation Act, 1889. These definitions, which by their variety shew how flexible a word "colony" is, are specifically limited to the word as used in the Act or in other statutes. They cannot control the meaning of the word in a will, nor do they afford guidance as to such meaning excepting so far as they had influenced the ordinary use of the word at the date of the will. In the present case the will is of earlier date than the Act which for this purpose might probably be of the greatest value, namely, the Colonial Stock Act, 1900, and therefore the definition in this Act is wholly irrelevant. In my opinion no assistance is to be derived from a statutory source, and we are thrown back on the ordinary use of the word without any guidance either from decisions or from statutes.

Fortunately, in the present case the Court is not asked to give a complete interpretation of the phrase, but we are only asked to decide whether the stocks of certain provinces of the Dominion of Canada come within it. Taking, first, those of Manitoba and Saskatchewan, I am satisfied that no person in ordinary parlance would consider either of these as being in itself a colony or dependency. They would be regarded as parts of the particular colony or dependency of Canada, but I am satisfied that no one would look at them as separate entities constituting in themselves colonies or dependencies.

The case of the other four provinces—namely, Quebec, Ontario, Nova Scotia, and British Columbia—is somewhat different. At certain times in the past each of these provinces had a separate existence which would have entitled them, in my opinion, to be

called colonies, and I think that stocks issued by them while they had that status would probably have come within the permitted list, although I do not decide the point inasmuch as the case is not before us. But for many years before the date of this will this separate existence had ceased, and they had become in every respect in the same position as Manitoba and Saskatchewan. Holding, as I do, that the question of being a colony must be determined by the condition of things at the moment, I am of opinion that these tracts had ceased to possess such a status as would have entitled them in common parlance to be called entire colonies at the date of the will. I think it would be very mischievous if we were to draw, on historical grounds, any distinction between the different provinces of Canada in such a matter as this.

The word "dependency" is much vaguer than the word "colony," but I am satisfied in my own mind that none of these provinces would be spoken of as a separate dependency any more than as a separate colony.

For these reasons I am of opinion that the decision of the learned judge was right, and that this appeal must be dismissed.

FARWELL L.J. The testator in this case died before the Colonial Stock Act, 1900, came into operation, and at a time, therefore, when colonial stocks were not ordinary trustee securities. The passing of that Act has rendered the decision in this case of little practical importance, as it is open to all colonies within the Colonial Stock Acts to adopt the procedure pointed out by those Acts and so render their stocks trustee securities.

The investment clause in this will—"stocks or securities of any British colony or dependency"—is a form that has been in common use for many years, probably for more than half a century. In this case the tenant for life desires the trustees to invest on the securities of several Canadian provinces, none of which have brought themselves within the Colonial Stock Acts. The question is whether they are within the words "any British colony or dependency," and I am of opinion that they are not. The time for ascertaining whether any stock or security is or is not within the power is the date of the proposed investment:

C. A. 1911

MARYON-WILSON'S ESTATE, *In re.*

Farwell L.J.

e.g., no investment could properly be made in the securities of a territory which was at the date of the testator's death a British colony, but which at the time of the proposed investment had been ceded to another country (as was Heligoland to Germany). It is therefore immaterial to consider the past history of the territories named, or to remember that at one time British Columbia and Vancouver were colonies by Act of Parliament. They are now integral parts of the Dominion of Canada, and their only proper title is "province."

"Colony" has no definite technical meaning in a deed or will, and it is unnecessary to attempt to find one for the purposes of this case; it is sufficient to say that these are provinces of the Dominion, and are not properly styled colonies at all, although they may bring themselves within the definition of the word in the Colonial Stock Acts.

Then there is the word "dependency." This also has no definite technical meaning. It is, in my opinion, a wider and perhaps more dignified phrase than "colony." The Oxford Dictionary defines it as "a country or province subject to the control of another of which it does not form an integral part." None of the provinces in this case can properly be called a dependency; they are all parts of the Dominion of Canada, one of the greatest dependencies of the United Kingdom, but are not themselves separate dependencies. The word probably found its way into Mr. Davidson's Forms because it has never been usual to speak of Canada as a colony. The phrase used to be "dependency," or "province," and is now "Dominion." In the Oxford Dictionary "Canada" is defined as the name of a British possession or "Dominion" in North America. In the British North America Act, 1867, the provinces of Canada, Nova Scotia, and New Brunswick are federated into one Dominion under the Crown "under the name of Canada," and "Canada" is divided into provinces. The cautious draftsman may have thought it doubtful whether Canada would fall within the term "colony," and he therefore added a wider phrase which would certainly include it.

I agree with the Master of the Rolls in thinking that investment clauses purporting to add to the wide range of investments

now authorized by law should be construed strictly for the protection of trustees and remaindermen; if a greater latitude is to be allowed, testators and settlors should express its extent in clear terms.

Solicitors for all parties: *May, How & Chilver.*

F. E.

In re HOYLES.
ROW *v.* JAGG (No. 2).

[1911 H. 673.]

Trustee—Liability—Unauthorized Investment—Settled Fund—Capital and Income—Claim of Remainderman for Excess of Income received by Tenant for Life beyond Amount obtainable from authorized Investments—Trustee also Tenant for Life.

Where a trustee has invested a settled fund in unauthorized investments and the tenant for life has thereby received a larger income, but the capital is intact, the persons entitled in remainder cannot claim to recover from the tenant for life the excess of income which has been paid to him. And this rule applies to a case where the same person is trustee and tenant for life and has herself retained the excess of income.

WILLIAM JOHN HOYLES by his will, dated June 25, 1878, gave all his real and personal estate to his wife, Eliza Hoyles, for her life with power to dispose before her decease of one third thereof, such disposal to take effect after her decease in such manner and to such purposes as she herself should choose and determine. The other two thirds he gave, one to his brother Hugh William Hoyles for the purpose of dividing the same among members of the Hoyles family, and the other to charity. He appointed his wife and his said brother executors. The testator died on February 22, 1888; his brother died in his lifetime, and the will was proved by the widow alone in England on July 24, 1888.

The widow died on December 4, 1906, having by her will, in exercise of the power of appointment (if any) given to her by her husband's will over one third of his estate, directed her

SWINFEN EADY J.
1911
HOYLES, *In re.* ROW *v.* JAGG (No. 2).

funeral and testamentary expenses and debts to be paid thereout, and, after giving certain legacies, appointed the residue to the children of her husband's brother and sister. She gave the residue of her own real and personal estate to the same persons. The testatrix's will was duly proved in England on January 19, 1909. Both the testator and testatrix were domiciled in England at their respective deaths. Part of the testator's estate consisted of $16,340 secured upon mortgages of freehold lands in Canada bearing interest at 5 or 6 per cent.

It was decided upon a former summons taken out for the determination of questions arising under the testatrix's will (*In re Hoyles, Row* v. *Jagg* (1)) by Swinfen Eady J. and the Court of Appeal that the widow had a power of appointment by will over one third of her husband's property, and that the testator's gift of one third of his property to charity failed to the extent of the said mortgage debts, which were impure personalty.

The widow received during her life the whole of the interest on these mortgages and retained it for her own use, and had also reinvested in Canadian mortgages at similar rates of interest the moneys received on the payment off of some of the mortgages, and also invested in the same way some part of the testator's estate which at his death was invested in stocks and shares. The amount invested on Canadian mortgages at her death was $18,476.

This summons was taken out by the executor of Mrs. Hoyles for the determination, inter alia, of the questions whether the testatrix ought to have invested all moneys arising from conversion of the testator's estate in such securities as are authorized by the Court or by statute for the investment of trust funds, and whether she was bound to repay to the testator's estate any sums received by her in respect of income in excess of what she would have received if she had invested the proceeds of conversion in such trust investments. This summons had originally come before Neville J., and he, after being referred to *In re Moses* (2), had directed it to stand over for evidence to be procured of the Canadian law.

Evidence was now given on the law of Ontario to the

(1) [1910] 2 Ch. 333; [1911] 1 Ch. 179. (2) [1908] 2 Ch. 235.

effect that the rule in *Howe* v. *Earl of Dartmouth* (1) would be applied in a proper case, but that the mortgages in question were authorized trust investments according to the local law.

Heckscher, for the summons.

W. M. Cann, for persons entitled in remainder. After the evidence that these mortgages were good trust investments according to the law of Ontario I cannot contend that the widow was liable on the principle of *Howe* v. *Earl of Dartmouth* (1) to account for the surplus income received by her from the mortgages which existed at the testator's death and were retained by her. But this is an English will being administered by an English executrix, and it was a breach of trust to invest any moneys which came to her hands after her husband's death in Canadian mortgages. This applies to the reinvestment of mortgage moneys paid off and to the fresh investments of personal estate. In both these cases she has made a profit out of the trust estate, in the form of increased income, by a breach of trust, and she must account for all income over 3 per cent. received by her.

Stroud v. *Gwyer* (2) and *Slade* v. *Chaine* (3) decided that a trustee who had paid the excessive income to another person who was tenant for life was not bound to repay the excess to a remainderman when the capital was intact, but they cannot apply where the trustee is also tenant for life, so as to enable him to make a profit out of his own breach of trust.

Fawell, for the legal personal representative of the widow. I cannot contend that the Canadian mortgages taken by the trustee herself were authorized securities, but the tenant for life was entitled to the whole income. The only persons who could claim the excess of income would be the remaindermen, and all that they can claim is to have the capital paid to them intact. *Stroud* v. *Gwyer* (2) and *Slade* v. *Chaine* (3) are clear authorities that neither the tenant for life nor the trustee can be made to repay the excess of income to the remaindermen. The principle applies where the same person is trustee and tenant for life. If a tenant for life can give a good receipt to a trustee, he can, as

(1) (1802) 7 Ves. 137a.
(2) (1860) 28 Beav. 130.
(3) [1908] 1 Ch. 522.

SWINFEN EADY J.
1911
HOYLES, *In re.*
ROW *v.* JAGG (No. 2).

tenant for life, give a good receipt to himself as trustee. There was a slight loss of about 60*l.* in the realization of the mortgages. I admit that the widow must make that good.

W. M. Cann in reply.

SWINFEN EADY J. The trustee is not liable to account for the difference between 3 per cent. and what she actually received. The testator died on February 22, 1888. The widow was the sole executrix and trustee and was also tenant for life. A considerable part of the estate was invested in Canadian mortgages bearing a higher rate of interest than can be obtained for trustee investments in England. The widow entered into possession and received that interest until her death in 1906. It is not disputed that she was entitled to receive the full interest on the mortgages which were in existence at the testator's death. But some of the mortgages were paid off, and the widow reinvested the proceeds in similar mortgages, and also invested some part of the testator's personal estate upon like mortgages. It is now claimed that an account ought to be taken for some eighteen years during which the widow was tenant for life, and that she ought to be disallowed all sums received by her by way of interest above 3 per cent. on the new mortgages as distinct from the mortgages existing at the testator's death, and that it should be determined she is only entitled to retain for her own use the 3 per cent., and ought to repay to the present trustees of her husband's will the difference between the 3 per cent. and the rate that was actually received. Now it appears that with regard to the additional mortgages there was a slight loss on realization, really because the mortgages had to be paid before the date at which the money was due, and transferees had to be found, and in this way a loss of some 60*l.* has been incurred. The widow submits to pay that sum, and therefore no question arises with regard to that. She does not contend that she is entitled to retain the increased interest arising from those mortgages without making good the loss of capital.

I am of opinion that upon her doing that, she is not under any further liability to account. If a trustee, not being tenant for

life, had invested money in an unauthorized security which had brought in 5 per cent., and had paid that 5 per cent. to the tenant for life, and the whole of the capital had been replaced to the trust account, neither the tenant for life nor the trustee would have been under any obligation to increase the capital by the difference between the rate of interest obtainable on authorized investments and the 5 per cent.; the tenant for life would have been entitled to retain the 5 per cent. for his own use, and in my opinion the rule laid down in *Stroud* v. *Gwyer* (1), and recently applied in the Court of Appeal in the case of *Slade* v. *Chaine* (2), applies to the present case. Indeed in *Slade* v. *Chaine* (2) the Master of the Rolls said: "It is said that some distinction ought to be drawn because the tenant for life was the wife of the trustee, and was not entitled for her separate use, but the husband was entitled in her right. I entirely fail to see how that can make any difference in this case." In that case, therefore, in substance the trustee was really also the tenant for life. The result is that upon the widow's estate making good the 60*l.* it is not liable to refund the difference between the rate of interest obtained from these various mortgages and 3 per cent.

Solicitors: *Charles Sawbridge & Son.*

(1) 28 Beav. 130.

(2) [1908] 1 Ch. 522, 535.

J. R. B.

SWINFEN EADY J.

1911

Nov. 21, 28.

In re HOME AND FOREIGN INVESTMENT AND AGENCY COMPANY, LIMITED.

[00442 of 1910.]

Company — Winding-up — Surplus Assets — Distribution — Various Issues — No Priority as to Capital—Preference and Ordinary Stock created and issued as such—Preference and Ordinary Stock converted from Shares—Bonus Preference Stock issued on Conversion to maintain Dividend — Partly-paid Ordinary Shares—Partly-paid Ordinary Stock created and issued as such.

The original capital of a company consisted of preference and ordinary shares, the preference shares having a fixed dividend but no priority as to capital.

The company having power to convert its paid-up shares into stock converted its ordinary shares into ordinary stock at face value, but in converting its preference shares into preference stock bearing a lower rate of interest it gave the holders extra bonus stock to maintain their former dividends.

The company also made direct issues of fully-paid preference and ordinary stock for cash without going through the formality of first issuing fully-paid shares and converting them.

The company also made direct issues of partly-paid ordinary shares and partly-paid ordinary stock for cash.

All the holders were placed on the register and received dividends.

Many years after these issues were made the company was wound up voluntarily, and after paying all the creditors the liquidator had a balance of surplus assets for distribution among the members:—

Held, (*a*) that, having regard to the lapse of time, the irregularity in the direct issues of the fully-paid preference and ordinary stock must be treated as waived, and the holders were entitled to rank for the full amount of their holding;

(*b*) That the original holders and transferees of preference stock converted from fully-paid preference shares could only rank for the amount representing conversion at face value and not for the bonus stock, which was wholly ultra vires and must be treated as non-existent;

(*c*) That the holders of partly-paid shares were entitled to rank for the amount paid and were subject to a call for equalization;

(*d*) That the original holders and transferees of partly-paid ordinary stock were not entitled to rank at all, as their stock was wholly ultra vires and must be treated as non-existent;

(*e*) That no call could be made on the holders of the bonus or partly-paid stock.

SUMMONS.

The above company was incorporated on September 18, 1872,

with a capital of 30,000*l.* divided into 6000 shares of 5*l.* each. The articles of association did not exclude Table A of the Companies Act, 1862 (25 & 26 Vict. c. 89). Article 2 provided that 10,000*l.* of the capital should be raised by ordinary shares of 5*l.* each and 20,000*l.* by 6 per cent. preference shares of 5*l.* each.

In 1874 article 2 was altered and it was provided that 10,000*l.* should be raised by 2000 ordinary shares of 5*l.* each and 20,000*l.* by 400 6 per cent. and 3600 5 per cent. preference shares of 5*l.* each.

In 1876 a new alteration was made and it was provided that 10,000*l.* should be raised by 2000 ordinary shares of 5*l.* each and 20,000*l.* by 350 6 per cent. preference, 350 5 per cent. preference, and 3300 4½ per cent. preference shares of 5*l.* each.

In 1882 a scheme was approved by the directors for converting the 6 per cent., 5 per cent., and 4½ per cent. preference shares into 4 per cent. preference stock and the ordinary shares into ordinary stock. The preference shareholders were to have an increased amount of stock so as to give them the same income as before. This increased amount of stock is hereinafter called bonus stock.

In July, 1882, the articles were altered so as to carry out this scheme, and it was provided that 10,000*l.* should be raised by ordinary stock and 20,000*l.* by 4 per cent. preference stock. The profits of the company were to be applied first in payment of interest on debentures and debenture stock, secondly in payment of dividends on the 4 per cent. preference stock, and thirdly in payment of dividends on the ordinary stock up to 6 per cent. per annum. One half of the surplus profits was to be applied in payment of a supplementary dividend on the ordinary stock and the other half to the formation of a reserve fund, which might if necessary be drawn upon for the payment of the 6 per cent. dividend on the ordinary stock. The directors might issue the stocks at a premium, the premium to be carried to the reserve fund, but they might not issue the stocks at a greater discount than 5 per cent. except for the purpose of converting the preference shares outstanding at the close of July, 1882, into 4 per cent. preference stock.

SWINFEN EADY J.
1911
HOME AND FOREIGN INVESTMENT AND AGENCY COMPANY, LIMITED, *In re.*

At this date the issued capital consisted of 679 ordinary shares and 1067 preference shares, all fully paid. The preference issue consisted of 350 6 per cent., 350 5 per cent., and 367 4½ per cent. preference shares.

By October 31, 1882, the 1067 preference shares, whose face value was 5335*l.*, were converted into 6878*l.* fully-paid 4 per cent. preference stock. Of this amount 5335*l.* represented the face value conversion, and 1543*l.* the bonus stock added to maintain the former dividends.

In 1883 the articles were again altered. The capital was increased to 200,000*l.*, of which 180,000*l.* was to be raised by ordinary stock or ordinary shares of 5*l.* each and 20,000*l.* by 4 per cent. preference stock. The expression "ordinary stock" was in all subsequent articles to be taken as equivalent to a corresponding amount of ordinary shares of 5*l.* each; and for dividend, voting, and other purposes ordinary shares of 5*l.* each were to be considered as equivalent to a corresponding amount of ordinary stock.

In 1888 the articles were again altered. The capital was increased to 500,000*l.*, of which 480,000*l.* was to be raised by ordinary stock or ordinary shares of 5*l.* each and 20,000*l.* by 4 per cent. preference stock. The expression "ordinary stock" was in all subsequent articles to be taken as equivalent to a corresponding amount of ordinary shares of 5*l.* each; and for dividend, voting, and other purposes ordinary shares of 5*l.* each were to be considered as equivalent to a corresponding amount of ordinary stock.

On February 28, 1899, the issued capital as shewn in the balance-sheet was as follows :—

	£	*s.*	*d.*
£22,347 fully-paid ordinary stock	22,347	0	0
£4545 half-paid ordinary stock	2272	10	0
£85,555 being 17,111 half-paid ordinary 5*l.* shares	42,777	10	0
£7745 fully-paid preference stock	7745	0	0
£120,192	£75,142	0	0

The 7745*l.* preference stock was made up as follows:—

Stock created and issued as such	£867
Stock converted at face value of fully-paid preference shares	5335
Bonus stock issued to the preference shareholders on the conversion to maintain their former dividends	1543
	£7745

The 867*l.* stock created and issued as such was issued in multiples of 5*l.* except in one instance where on October 11, 1892, 152*l.* was issued to Miss Cochrane. It was not yet ascertained how much of the fully-paid ordinary stock had been converted from fully-paid shares, and how much had been issued as such, or what amounts had been issued in amounts other than multiples of 5*l.* Full dividends on the preference stock and some dividends on the ordinary stocks and shares were paid up to February 28, 1899. After that date no dividends were paid and no further change in the capital was made. The profits were accumulated until there was a sufficient fund to pay off the holders of debentures and debenture stock and the other creditors.

On November 17, 1908, the company went into voluntary liquidation. The holders of debentures and debenture stock and the other creditors were paid in full or otherwise satisfied, and there were no claims outstanding against the company by any creditor. The liquidator had now in his hands 12,500*l.* assets available for distribution amongst the shareholders and stockholders subject to costs. The preference shares and stocks did not carry any preferential rights in respect of capital.

This summons was issued to determine how the surplus assets ought to be distributed and whether any and what calls should be made upon any and what class of contributories for the purpose of adjusting the rights of the contributories inter se. No claim was made in respect of arrears of dividend.

Percy Wheeler, for the liquidator.

Beebee, for original holders of fully-paid ordinary stock created

SWINFEN EADY J.
1911
HOME AND FOREIGN INVESTMENT AND AGENCY COMPANY LIMITED, *In re.*

and issued as such. This stock was issued direct to the holders for cash. The issue was no doubt irregular. The company ought first to have issued shares for cash and then to have converted them into stock under the Companies Act, 1862, Table A, art. 23 [Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Table A, art. 31]. But that was a mere irregularity which could be waived by the company and its members. The issue has always been treated as valid, dividends have been paid, and at this distance of time the irregularity must be treated as waived: *Richmond's Case* (1); *In re Miller's Dale and Ashwood Dale Lime Co.* (2) The stockholders' names are on the register and they are members within the Companies Act, 1862, ss. 23, 38 [Companies (Consolidation) Act, 1908, ss. 24, 123], although their holding is called stock. Stock is "simply a set of shares put together in a bundle": *Morrice* v. *Aylmer*. (3)

On the other hand the issue of the bonus preference stock and the half-paid ordinary stock was altogether beyond the powers of the company and could not therefore be set right by lapse of time or estoppel: *Welton* v. *Saffery*. (4) The bonus stock and half-paid ordinary stock must therefore be treated as non-existent and disregarded accordingly.

J. V. Nesbitt, for transferees of fully-paid ordinary stock created and issued as such. I adopt Mr. Beebee's argument as to the original issue. As against transferees for value without notice the company is in any case estopped by their certificate: *Burkinshaw* v. *Nicolls*. (5)

Tomlin, for original holders of fully-paid preference stock created and issued as such. With the exception of Miss Cochrane's 152*l*. this stock was issued in multiples of 5*l*. The odd 2*l*. can be wiped out. Otherwise I adopt Mr. Beebee's argument.

H. S. Preston, for transferees of fully-paid preference stock created and issued as such. I adopt the arguments of Mr. Beebee and Mr. Nesbitt.

Jolly, for original holders of fully-paid preference stock

(1) (1858) 4 K. & J. 305, 319.
(2) (1885) 31 Ch. D. 211.
(3) (1875) L. R. 7 H. L. 717, 725.
(4) [1897] A. C. 299, 305.
(5) (1878) 3 App. Cas. 1004, 1016, 1026.

converted from fully-paid preference shares. I cannot support that part of my stock which represents bonus. It was clearly ultra vires and must be written off so as to reduce the stock to the face value of the shares. The holders will then be in the same position as if they held their original shares. Again, the whole direct issue of stock as such was void under the Companies Act, 1862, s. 12 [Companies (Consolidation) Act, 1908, ss. 7, 41], and ought to be disregarded. An act that is absolutely ultra vires cannot be made good by estoppel: Lindley on Companies, 6th ed. pp. 215, 671; *Great North-West Central Ry. Co.* v. *Charlebois* (1); *Ashbury Railway Carriage and Iron Co.* v. *Riche*. (2)

Owen Thompson, for transferees of fully-paid preference stock converted from fully-paid preference shares. This stock, including the bonus stock, has always been treated as validly issued, and having regard to the lapse of time and the receipt of dividends the entire issue should now be treated as valid: *Ex parte Sandys*. (3) In any case transferees for value without notice are entitled by estoppel to rank for the full amount of their stock: *Burkinshaw* v. *Nicolls* (4); *Ex parte Sandys*. (3)

Harman, for original holders of half-paid ordinary stock created and issued as such. This issue being entirely beyond the company's powers could not be set right by acquiescence or estoppel: Lindley on Companies, 6th ed. pp. 70, 1065, 1066; *Bank of Hindustan, China and Japan* v. *Alison* (5); *Alison's Case* (6); *Royal Bank of India's Case* (7); *Stace and Worth's Case* (8); *Feiling's and Rimington's Case*. (9) In *Richmond's Case* (10) and *Sewell's Case* (11) the irregular issue was capable of ratification. In this case it is wholly ultra vires. We are therefore not members or liable to any call as contributories. We are really creditors for the money we paid: *Alison's Case*. (6) The receipt of dividends would not make us members if the issue of our stock was absolutely ultra vires. Our claim

(1) [1899] A. C. 114.
(2) (1875) L. R. 7 H. L. 653, 673.
(3) (1889) 42 Ch. D. 98.
(4) 3 App. Cas. 1004, 1016, 1026.
(5) (1870-1) L. R. 6 C. P. 54, 222, 223, 227.
(6) (1873) L. R. 15 Eq. 394; 9 Ch. 1, 6, 24.
(7) (1869) L. R. 4 Ch. 252, 261.
(8) (1869) L. R. 4 Ch. 682.
(9) (1867) L. R. 2 Ch. 714, 729.
(10) 4 K. & J. 305, 319.
(11) (1868) L. R. 3 Ch. 131.

SWINFEN EADY J.
1911
HOME AND FOREIGN INVESTMENT AND AGENCY COMPANY, LIMITED, *In re.*

as creditors is, however, probably barred by the Statutes of Limitation and cannot in any case be settled on this summons. Our real contention here is that we are not members, and we are quite prepared to stand aside, so long as we have nothing to pay. Even if we are members we are not shareholders, and no call can be made on us under the Companies Act, 1862, s. 38. If, however, any call can be made on stockholders we say that except in the case of transferees for value without notice the holders of the bonus stock ought to pay up half the nominal value of their stock to bring themselves to our level before any call is made on us.

Winterbotham, for transferees of half-paid ordinary stock created and issued as such, adopted the same arguments.

F. A. Milne, for holders of half-paid ordinary shares. The bonus stock was really issued at 100 per cent. discount. The holders ought to pay up 50 per cent. to bring themselves level with our half-paid shares, and a further amount in proportion to the call (if any) that may be made on us: *Welton* v. *Saffery*. (1) The company cannot deny their membership: *In re Wakefield Rolling Stock Co.* (2) The holders of the half-paid ordinary stock are members. They have been treated as members and received dividends. They cannot now change their front and say they are creditors. If a call is made on us they must pay a similar proportion to keep their level.

J. G. Wood and *Manby*, for holders of fully-paid ordinary stock converted from fully-paid ordinary shares. Our stock is clearly valid under the Companies Act, 1862, Table A, art. 23. The holders of the half-paid shares and stock can only rank for the amount paid. The shares are clearly subject to a call for equalization, and the holders of the bonus and half-paid stock can only claim to rank on submitting themselves to a similar liability.

SWINFEN EADY J. This is a summons taken out in the winding up of the Home and Foreign Investment and Agency Company, Limited, to determine how a sum of 12,500*l.* cash now available for distribution should be divided. The circumstances giving rise to the application are that the directors

(1) [1897] A. C. 299, 305. (2) [1892] 3 Ch. 165, 173.

appear to have committed many irregularities in dealing with the company's capital, and it is the unusual and irregular manner in which that capital has been dealt with that necessitates this application. All the outside creditors have been paid. The application has reference entirely to the rights of the contributories inter se, the sum of 12,500*l*. remaining available for distribution subject only to costs.

At the date of the winding-up the company's capital apart from any question as to regularity or irregularity of issue consisted of 7745*l*. 4 per cent. preference stock, 22,347*l*. fully-paid ordinary stock, 4545*l*. half-paid ordinary stock, and 17,111 half-paid 5*l*. shares. According to the constitution of the company the preference and ordinary stocks and shares rank rateably on a division of the assets in the winding-up. The preference have no priority over the ordinary stocks and shares to repayment of capital, so that if there were no irregularities the preference and ordinary stock and share holders would rank rateably inter se subject only to a claim for equalization in respect of those fully paid and those partly paid. But having regard to the irregularities it is necessary to deal more in detail with the respective issues.

I will first deal with the 7745*l*. 4 per cent. preference stock. It appears that 5335*l*. of this represents fully-paid preference shares converted into stock at their face value. In my opinion the company had power to convert its fully-paid capital into stock. Art. 23 of Table A of the Companies Act, 1862, contains a provision for the conversion of paid-up shares into stock, and there was nothing in the company's articles to exclude or modify that provision. There is therefore no objection to the validity of the 5335*l*. preference stock, and it is entitled to rank in the distribution and return of capital as if it were fully-paid shares.

I will next take the 867*l*. 4 per cent. preference stock issued as such. This appears to have been issued in multiples of 5*l*. except in the case of the 152*l*. issued to Miss Cochrane. Disregarding this odd 2*l*. as invalid there was 865*l*. 4 per cent. preference stock issued as such. The validity of this stock is objected to on the ground that although the allottees paid 865*l*. in full for

SWINFEN EADY J.
1911
HOME AND FOREIGN INVESTMENT AND AGENCY COMPANY, LIMITED. *In re.*

the 865*l.* stock the company did not go through the form of first issuing shares, and then converting the shares into stock. The company had power to issue the shares, and to convert them when fully paid into stock, but, instead of doing that, they omitted the intermediate formality of issuing shares and converting them, and issued the fully-paid stock as such in the first instance. In my opinion I am entitled to treat that omission as a mere irregularity and look at the substance of the transaction, which was that the allottees paid 865*l.* in respect of a corresponding amount of notional shares that were eo instanti converted into stock. As Lord Hatherley says in *Morrice* v. *Aylmer* (1), stock is "simply a set of shares put together in a bundle," and in my opinion at this distance of time the irregularity must be treated as waived, and the holders are in the same position as if they had originally held the corresponding number of shares and those shares had been converted into stock.

The other portion of the preference stock is the 1543*l.* bonus stock. No sums were paid by the allottees into the coffers of the company in respect of this stock. It came into existence in this way. The company had created 6 per cent., 5 per cent., and 4½ per cent. preference shares, and in order to enable it to have only one quality of preference stock which was to carry 4 per cent. interest and to convert the preference shares into that stock without causing any loss of income to the shareholders, the necessary proportion of bonus stock was issued to these shareholders on the conversion. It was contended that at this distance of time and having regard to their receipt of dividends the bonus stock holders ought to be treated in all respects as other fully-paid stock holders. But in my opinion the bonus stock was illegally issued. The issue was wholly ultra vires, and no claim in respect of it can be sustained either by the original allottees or by transferees. Even when that issue is put aside the stockholders have up to February 28, 1899, received the same amount of dividend as near as may be as they would have received upon the original shares validly created. They do not claim in respect of arrears of dividend, and they can only claim a return of capital in respect of the 5335*l.* stock

(1) L. R. 7 H. L. 717, 725.

converted at the face value of the shares without taking into account the 1543*l.* bonus stock.

Now the creation of that bonus stock was absolutely beyond the powers of the company, and I am quite unable to take the view that the proper course would be to hold that the allottees ought now to pay up on the footing that they hold a corresponding number of unpaid shares. They never agreed to take shares. The case is different from *Welton* v. *Saffery* (1), where the question really was whether the holder of unpaid bonus shares and partly-paid discount shares could be compelled to pay the amount unpaid. Lord Halsbury says: "Whether for the purpose of settling the rights inter se, or for the purpose of satisfying creditors, it appears to me that the statute enforces upon company and shareholder alike conformity to the rule laid down, that a share for a fixed amount shall make the person agreeing to take that share liable for that amount." The appellant in that case had agreed to take the shares, and there being no contract under the Companies Act, 1867 (30 & 31 Vict. c. 131), s. 25, he had to pay in cash. That reasoning does not apply to the allottees of the bonus stock. They never agreed to take any shares at all. Again, no doctrine of estoppel can prevent the question now being raised, because a corporate body cannot be estopped by deed or otherwise from shewing it had no power to do what it purported to do. The issue of the bonus stock was illegal, and I need not refer to cases like *Baroness Wenlock* v. *River Dee Co.* (2) to shew what the result of an ultra vires transaction is. It is not binding on the company. The result is that the 865*l.* and the 5335*l.* preference stock rank for dividend in the distribution, but the 1543*l.* bonus stock must be treated as non-existent and not entitled to rank at all.

I now come to the 22,347*l.* fully-paid ordinary stock. I do not know how the odd 2*l.* arose in this case, but no objection to the amount has been taken and I treat it as accurate. This stock is unobjectionable. It either arose from the conversion of fully-paid shares or was issued as fully-paid stock and is covered by

(1) [1897] A. C. 299, 305. (1885) 10 App. Cas. 354.
(2) (1883) 36 Ch. D. 675, n.;

SWINFEN EADY J.

1911

HOME AND FOREIGN INVESTMENT AND AGENCY COMPANY, LIMITED, *In re.*

my decision as to the preference stock issued as such. It will rank for the full 22,347*l.*

The next item is 17,111 half-paid 5*l.* shares. Those shares will rank for dividend for a return of capital and they are also liable to have a call made upon them for equalization. The amount of the call will depend on the next item.

The last item is the 4545*l.* half-paid ordinary stock. My previous remarks as to the bonus stock apply to this half-paid stock. The whole transaction was invalid. The stockholders did not contract to take shares. No call can be made on them, and I cannot accede to the contention that they ought to pay either the remaining moiety unpaid or a sufficient sum for equalization. The transaction was invalid and illegal. The stockholders are under no enforceable liability, call or otherwise, and on the other hand they are certainly not now entitled to repayment. They cannot now rank as creditors. The creditors have been determined and provided for, and moreover it is not disputed that even if they were otherwise entitled the Statutes of Limitation would bar any claim they might have to a return of their money. The 4545*l.* half-paid ordinary stock must for the purpose of dividing the surplus assets be treated as non-existent. The holders do not make any further contribution and they do not obtain any return.

Solicitors : *Master, Hussey & Master, for S. Gurney Hill & Son, Norwich; A. C. Kent, for Ernest A. Kent, Norwich; Sharpe, Pritchard & Co., for Stevens, Miller & Jones, Norwich; Morgan, Upjohn & Leach, for Chittock & Chittock, Norwich; Waterhouse & Co., for Cozens-Hardy & Jewson, Norwich; Waterhouse & Co., for H. Goodchild, Norwich; Master, Hussey & Master, for W. R. Cooper, Norwich; Williamson, Hill & Co., for H. E. B. Rackham, Norwich.*

G. R. A.

SCHWEDER *v.* WORTHING GAS LIGHT AND COKE COMPANY.

EVE J.
1911
Oct. 24, 25, 30, 31.

[1910 S. 3812.]

Road—Public Highway—Power to break up Soil of Street and lay Pipes—Trespass—Tunnel—"Building"—Gas Main—Mandatory Injunction—Statute—Construction—Gasworks Clauses Act, 1847 (10 & 11 *Vict. c.* 15), *ss.* 6, 7, 10—*Worthing Gas Act*, 1907 (7 *Edw.* 7, *c. lxxxix.*), *ss.* 5, 7.

By s. 6 of the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), the undertakers were authorized to open and break up the soil of streets and bridges within the limits of their special Act, and to open and break up any sewers, drains, or "tunnels" under such streets, &c., and to lay down pipes therein for supplying gas. But s. 7 provided that nothing therein should authorize the undertakers "to lay down or place any pipe or other works into, through, or against any building, or in any land, not dedicated to public use, without the consent of the owners and occupiers thereof."

Sect. 10 provided that any street, bridge, sewer, drain, or tunnel so broken up should be "reinstated" and made good without delay.

The plaintiff, who was the owner of land on either side of a public highway, bored a tunnel thereunder to be used as a passage way. It was constructed of brick, the roof consisting of girders embedded in cement concrete 12 inches thick, and resting upon brickwork 18 inches thick. The defendant company, relying on their statutory powers under the Gasworks Clauses Act, 1847, and without the consent of the plaintiff, excavated the road over the tunnel, carried away part of the cement concrete, and laid down two gas mains, one of which practically rested upon the roof of the plaintiff's tunnel:—

Held, (1.) that the tunnel was a "building" within s. 7 of the Gasworks Clauses Act, 1847.

Thompson v. *Sunderland Gas Co.* (1877) 2 Ex. D. 429, followed.

Held, (2.) that the structure was not a tunnel within the meaning of s. 6 with which the defendants could interfere.

Caledonian Ry. Co. v. *Glasgow Corporation* (1901) 3 F. 526, followed.

Held, (3.) that if it were a tunnel within s. 6 the obligation to restore it to the status quo ante under s. 10 had not been complied with.

Held, therefore, that a mandatory injunction would be granted to abate the trespass by the defendants in laying the pipes into, through, or against the plaintiff's building.

ACTION.

The plaintiff, Paul Ernest Schweder, was the owner and occupier of land lying on both sides of a road known as Goring

EVE J. 1911

SCHWEDER v. WORTHING GAS LIGHT AND COKE COMPANY.

Lane, in the county of Sussex, within the district and under the control of the East Preston Rural District Council.

The defendant company was incorporated by the Worthing Gas Act, 1868, for the purpose of making and supplying gas within certain limits which included the town of Worthing, between two and three miles from the plaintiff's property. In 1907 the defendants obtained a further Act, called the Worthing Gas Act, 1907 (7 Edw. 7, c. lxxxix.), whereby they were authorized (by s. 5) to purchase by agreement certain lands, and to construct gasometers and other works thereon for the manufacture and storage of gas, and (by s. 7) to lay down gas pipes and mains in the parish of Goring for the purpose of connecting the gasometers and other works to be constructed on the land with the existing gasworks of the company at Worthing, and for this purpose to exercise the powers of the Gasworks Clauses Act, 1847, with respect to the breaking up of streets in order to lay gas mains. This Act was incorporated, with certain exceptions, in the Worthing Gas Act, 1907. The defendants purchased land near the plaintiff's property, under the powers of their special Act, in order to erect gasometers and other works. In September, 1910, before the company had commenced erecting any of their works upon the newly-purchased land, the plaintiff, who had strongly opposed the passing of the bill in Parliament, completed the boring of a passage, arch, or tunnel under Goring Lane for the purpose of enabling him to pass from one side to the other. The plans for this tunnel were approved by the rural district council as the highway authority. The tunnel had flights of steps leading down to it on either side, and was provided with doors. It was about 6 feet high and 3 feet wide, and was constructed of brick strengthened with iron girders and cement concrete. The roof consisted of a brick arch over which was laid a network of transverse and longitudinal girders embedded in concrete 12 inches thick. The top of the roof was about 15 inches below the surface of the road. In December, 1910, the defendants, in alleged pursuance of their statutory powers, opened and excavated the road near the tunnel and carried away part of the cement concrete forming the roof thereof, and laid down two gas mains, as the plaintiff alleged, in and through the roof

of his tunnel at a depth of more than 2 feet below the surface of the road, and then filled up the ground. From a special report made at the suggestion of the judge by two competent gentlemen, during the course of the trial, it appeared that the larger gas main, which was chiefly objected to, was represented by a rectangular steel box placed over one of the longitudinal girders, the bottom of the box being about an inch and three-quarters below the top of the higher or transverse girders, and resting on a strip of pine wood half an inch thick placed over the girder. The heads of the rivets had sunk until they almost reached the girder. The smaller pipe was a 10-inch steel main laid so that the top was level with the top of the box pipe, and the bottom was just above the level of the transverse girders. The substance of the report was that for all practical purposes the main did lie upon and, to a certain extent, in and through the roof of the plaintiff's tunnel. The defendants alleged that the works so executed by them were for the purpose of connecting the land purchased under the powers of the Worthing Gas Act, 1907, and the works erected thereon, with the town of Worthing, but no gas or other works had in fact been erected, nor were the pipes laid in the roof of the plaintiff's tunnel at present required.

The plaintiff claimed (1.) a declaration that the defendants were not entitled, without his consent, to lay down any pipe or other works into, through, or against any part of the tunnel, or in any land of the plaintiff underlying Goring Lane, and not being land dedicated to public use. (2.) An order directing the defendants to remove all pipes and other works so placed by them.

P. O. Lawrence, K.C., and *Bryan Farrer*, for the plaintiff. The first question is whether the tunnel in question is a "building" within the meaning of the Gasworks Clauses Act, 1847. The second is whether these pipes are laid in land dedicated to the use of the public.

The company have power to break up streets under the provisions of the Gasworks Clauses Act, 1847 (1), but not to

(1) By 10 & 11 Vict. c. 6, it was provided: "The undertakers, under such superintendence as is hereinafter specified, may open and break

EVE J. 1911 SCHWEDER v. WORTHING GAS LIGHT AND COKE COMPANY.

lay a gas pipe "in, through, or against a building." The case is covered by the decision in *Thompson* v. *Sunderland Gas Co.* (1), where the very point was decided. This tunnel is a solid structure and a "building" within the Act. The motive which may have led to its erection has nothing to do with the user of the property: *Bradford Corporation* v. *Pickles* (2); *Goodson* v. *Richardson.* (3)

It is clear from the report made by the two experts during the course of the trial that the gas main is laid "into, through, or against" the tunnel, which is for this purpose a building. It is not a "tunnel" within s. 6, which is intended to refer to something of the same character as sewers and drains. Secondly,

up the soil and pavement of the several streets and bridges within the limits of the special Act, and may open and break up any sewers, drains, or tunnels within or under such streets and bridges, and lay down and place within the same limits pipes, conduits, service pipes, and other works, and from time to time repair, alter, or remove the same, and also make any sewers that may be necessary for carrying off the washings and waste liquids which may arise in the making of the gas, and for the purposes aforesaid may remove and use all earth and materials in and under such streets and bridges, and they may in such streets erect any pillars, lamps, and other works, and do all other acts which the undertakers shall from time to time deem necessary for supplying gas to the inhabitants of the district included within the said limits, doing as little damage as may be in the execution of the powers hereby or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers."

By s. 7: "Provided always, that nothing herein shall authorize or empower the undertakers to lay down or place any pipe or other works into, through, or against any building, or in any land not dedicated to public use, without the consent of the owners and occupiers thereof; except that the undertakers may at any time enter upon and lay or place any new pipe in the place of an existing pipe in any land wherein any pipe hath been already lawfully laid down or placed in pursuance of this or the special Act or any other Act of Parliament, and may repair or alter any pipe so laid down."

By s. 10: "When the undertakers open or break up the road or pavement of any street or bridge, or any sewer, drain, or tunnel, they shall with all convenient speed complete the work for which the same shall be broken up, and fill in the ground, and reinstate and make good the road or pavement, or the sewer, drain, or tunnel, so opened or broken up, and carry away the rubbish occasioned thereby . . . ."

(1) 2 Ex. D. 429.

(2) [1894] 1 Ch. 145; [1895] A. C. 587.

(3) (1874) L. R. 9 Ch. 221.

the main is laid in ground not dedicated to public use. Only that part of the soil which is necessary for the support of the road is dedicated to the public, and the pipes here were laid below the line of the plaintiff's concrete roof: *Tunbridge Wells Corporation* v. *Baird* (1); *Battersea Vestry* v. *County of London and Brush Provincial Electric Lighting Co.* (2); *Marriott* v. *East Grinstead Gas and Water Co.* (3); *Caledonian Ry. Co.* v. *Glasgow Corporation* (4); *Foley's Charity Trustees* v. *Dudley Corporation.* (5) Further, the defendants have only power to lay pipes in connection with works constructed on the newly acquired land in accordance with s. 7 of the Worthing Gas Act, whereas, in fact, no works have been completed. These pipes are, so to speak, in the air.

Macmorran, K.C., and *Cozens-Hardy*, for the defendants. On the question of the dedication of the soil of the road, s. 6 of the Gasworks Clauses Act, 1847, has nothing to do with the right to the soil of the road; it merely gives the right to the undertakers to open the road and lay pipes; it overrides the ownership of the street. There is no such thing as a quantum of soil which is dedicated to the public, but the power under the statute must be exercised for a reasonable distance: *Lord Provost of Glasgow* v. *Glasgow and South Western Ry. Co.* (6)

The cases referred to on behalf of the plaintiff on this point go to shew that what becomes vested in the public authority is a qualified right in the soil, so far as is necessary for the purpose of controlling the road as a road. As to the tunnel, there is express power under s. 6 to break into a "tunnel," which this structure clearly is; there is nothing of the same nature as sewers and drains to which that word is really applicable. That being so, this tunnel cannot be described as a "building" within s. 7, and in any case not such a building as was contemplated by the Act.

In the case of *Taff Vale Ry. Co.* v. *Cardiff Gas Light and*

(1) [1894] 2 Q. B. 867; [1896] A. C. 434.
(2) [1899] 1 Ch. 474.
(3) (1908) 72 J. P. 509; [1990] 1 Ch. 70.
(4) 3 F. 526.
(5) [1910] 1 K. B. 317, 322.
(6) [1895] A. C. 376.

EVE J.
1911
SCHWEDER
v.
WORTHING
GAS LIGHT
AND COKE
COMPANY.

Coke Co. (1) Swinfen Eady J. said that a bridge was not a building within the meaning of s. 7 of the Gasworks Clauses Act, 1847. In the present case we submit that this structure is a "tunnel" within s. 6. There is an obligation under s. 10 to reinstate the road or tunnel when the pipes have been laid, but that has in effect been done. It is not the less a reinstatement because pipes have been placed beneath the surface instead of part of the concrete. The Act cannot mean that all the same materials should be put back. The word is not "replace." It is immaterial that something else is inserted, so long as it does not interfere with the surface of the road.

No reply was called for on the first point argued by the plaintiff.

EVE J., having stated the facts, continued: Now, these being the facts, I have to determine whether the position of that main is authorized by any of the statutory powers conferred upon the company. On behalf of the plaintiff it is argued that this tunnel is a building, that the main is against the building, and that, by the joint operation of ss. 6 and 7 of the Gasworks Clauses Act, 1847, the company is prohibited from laying a gas main against a building. To this it is answered, first, that the tunnel is not and cannot be described as a building; and, secondly, that even if it be a building it belongs to a particular class of buildings which must be treated as excepted from the operation of the sections relied upon, because the Act contemplates and expressly authorizes the breaking into and interference with a "tunnel," and it would be quite inconsistent with these powers to treat a tunnel as being a building into or against which a gas main might not be laid. The conclusions at which I have arrived are that this structure is a building, and that it is not a tunnel into which the company may break, or with which they may interfere. Upon the first point I am really bound by authority. I think it is quite impossible to differentiate this structure from the arches or vaults which were the subject of consideration in the case of *Thompson* v. *Sunderland Gas Co.* (2) The purpose for which those arches were originally built was unknown.

(1) (1907) 71 J. P. 350. (2) 2 Ex. D. 429.

They may have been vaults to some houses erected near or above them; they may have been, as the Lord Chancellor remarks, put there for the very purpose of supporting the road, but for whatever purpose they were put there, they were, he adds, works of an artificial character constructed by man, and constituted the result of the putting together of bricks and mortar, and were therefore buildings. How does this subway differ in its essential features from the vaults? Here we have a work of an artificial character constructed by man and constituting the result of the putting together of bricks and mortar, steel, and concrete, available for a variety of uses including use as a passage from one side of the road to the other. I cannot entertain any doubt that this is a building. Upon the second point, whether this is a tunnel with which the undertakers are entitled to interfere, I apply to the Act of 1847 the interpretation put by the Lord President upon exactly similar words in the Act with which he was dealing in the case of *Caledonian Ry. Co.* v. *Glasgow Corporation.* (1) I think the word "tunnel" is used to describe something ejusdem generis with sewers and drains. Counsel for the defendants protests that he is unable to conceive anything ejusdem generis with sewers and drains, but the words would, I apprehend, include such old barrel conduits as were occasionally constructed for enclosing streams or rivulets under streets. But for the present case it is perhaps enough to say that, in my opinion, the statutory power does not include an archway of this description, even though, when used for the purpose of passage from one side of the road to the other, it would accurately be described as a "tunnel." I think, perhaps, I ought to add this, that even if this were a tunnel within s. 6, and one therefore with which the undertakers were authorized to interfere, the obligation under the later section to restore and reinstate must not be lost sight of. Sect. 10 imposes the obligation upon the undertakers to reinstate the sewer, drain, or tunnel with which they have interfered. Does that mean that, having chipped off three parts of the roof, and laid their main upon what is left, they can cover the work up and say to the owner of the tunnel "Your tunnel is as good as ever it was: it is

(1) 3 F. 526.

EVE J. 1911 SCHWEDER v. WORTHING GAS LIGHT AND COKE COMPANY.

true we have taken away three-quarters of your roof represented by cement, and have substituted a main of our own, and in this way have reinstated your tunnel"? I do not think so; that does not seem to me to be reinstating a man's property; it is taking away his property and putting some one else's in its place. The obligation to reinstate is, it seems to me, an obligation to restore the status quo ante, and I cannot believe that it was intended that corporations or persons should, under cover of these statutory provisions, acquire power to replace another man's property with their own, or to divert sewers or drains, or substitute one construction for another. If, therefore, I had arrived at the conclusion that this structure was a tunnel with which the undertakers could interfere, I should still have held that in leaving it something different from what it was before they had acted ultra vires, and in derogation of the plaintiff's rights. In laying their mains it may well be that it is necessary for the undertakers temporarily to disturb obstructions in the nature of sewers, drains, or tunnels met with in the ground wherein they are laying their pipes; and the Act empowers them temporarily to abate or remove the interference caused by the presence of such sewers, drains, or tunnels, but I think it also imposes upon them the obligation, when the temporary interference has determined, to reinstate the obstructions in a condition substantially the same as that in which they were found.

The result, therefore, is that the plaintiff is, in my opinion, the victim of a trespass, and the relief to which he is entitled is a mandatory injunction requiring the defendants to abate the trespass.

That disposes of the case. At one time it looked as though there might have to be determined the interesting point whether any part of the soil lying below the line of the plaintiff's concrete roof was ever available for the laying of the main at all; whether, in fact, such part of the soil was not land belonging to the plaintiff and not dedicated by him to public use; but as the conclusions at which I have arrived on the other points entitle the plaintiff to all the relief which he seeks in the action, it is not necessary for me to express any opinion on

this further point. The defendants must pay the costs of the action.

Solicitors for plaintiff: *Kekewich, Smith & Kaye.*

Solicitor for defendants: *John Hands, for Verrall & Sons, Worthing.*

G. M.

STAFFORDSHIRE AND WORCESTERSHIRE CANAL NAVIGATION *v.* BRADLEY.

[1910 S. 3668.]

Fishery—In gross, or appurtenant—Canal—Fishing from Towing Path—Trespass — Deed — General Words — Construction — Staffordshire and Worcestershire Canal Act, 1766 (6 *Geo.* 3, *c. xcvii.*), *s.* 74.

Under an Act of 6 Geo. 3, c. xcvii., authorizing the construction of a canal there was granted (by s. 74) to each owner of land through which the canal was made the sole, several, and exclusive right of fishing in so much of the canal as was made in, over, or through his land; but the right of fishery thereby granted was to be exercised so that the canal, towing paths, banks, and other works should not be prejudiced or obstructed. Under a deed of March 31, 1845, a certain manor and estate through which the canal passed became vested in the Earl of S.; there was no express grant of this particular right of fishery, but there were general words in the deed passing all fisheries, profits, advantages, and appurtenances whatsoever to the manor and estate respectively belonging, or in anywise appertaining.

By a lease of July 23, 1910, the Earl of S. granted to an angling club, of which the defendant was a member, the exclusive right to fish for and take away all fish in a specified portion of the canal, at an annual rent, and the lessees covenanted so to exercise their rights as not to prejudice or obstruct the towing paths, banks, and other works of the canal. The plaintiffs having brought an action to test a claim by the defendant to fish in the canal from the towing path, without their consent:—

Held, (1.) that, having regard to all the circumstances, s. 74 of the Act conferred upon the grantees of the exclusive fishery a right to use the towing paths and banks of the canal for the exercise of that right.

But *held*, (2.) that the right, being one to take fish without stint, and without any relation to the needs of the land in respect of which the right was granted, was not a right appurtenant, or capable of being made appurtenant, to the land, but a right in gross, and not capable of passing under the general words of the deed of March 31, 1845.

Earl of Chesterfield v. *Harris* [1908] 2 Ch. 397; [1911] A. C. 623, applied.

Held, (3.) that if the right of fishery had passed under the deed of

EVE J.

1911

STAFFORDSHIRE AND WORCESTERSHIRE CANAL NAVIGATION v. BRADLEY.

March 31, 1845, it could properly have been made the subject of a lease.

Held, therefore, in the result, that the plaintiffs were entitled to a declaration that the defendant was not entitled to fish from the towing paths of the canal belonging to the plaintiffs without their consent, and that an injunction must be granted to restrain the trespass.

THE plaintiffs were incorporated by the Act 6 Geo. 3, c. xcvii., for the purpose of making and maintaining a navigable cut or canal from the river Severn, between Bewdley and Titton Brook, in the county of Worcester, to cross the river Trent at Heywood Mill, in the county of Stafford, and to communicate with a navigable canal intended to be made between the Trent and the Mersey. They were empowered by s. 1 of the Act to purchase lands and to make thereon the cut or canal, towing paths, banks, and ways convenient for the towing of boats and barges passing through the canal.

By s. 45 of the Act it was provided that the persons owning or employed in carrying paving stones, gravel, sand, or other materials for the repair of roads should have free liberty to make use of the towing paths, wharves, or quays belonging to the company, making good any damage to the sides or banks of the canal.

By s. 50 all persons were to have liberty to use with horses, cattle, and carriages the private roads and ways, except the towing paths, to be made by virtue of the Act in order to carry the various merchandise and commodities therein mentioned to and from the canal; and also to navigate upon the canal with boats of a specified size, and to use the wharves or quays for unloading the merchandise and commodities, and the towing paths for hauling and drawing such boats, upon payment of certain tolls.

By s. 52 the owners of lands adjoining the canal were allowed to use pleasure boats without interference and without paying any duty, but so as not to obstruct or prejudice the navigation of the canal or towing paths.

By s. 55 provision was made for the fencing of the towing paths from the adjoining lands by the canal company, and for the maintenance and support of the towing paths and fences.

By s. 60 landowners might erect wharves, quays, and warehouses upon their lands adjoining the canal, and land goods or

merchandise thereupon, or upon the banks, but so as not to obstruct the navigation of the canal, or towing paths.

By s. 73 the rights of the lords of manors in respect of mines, minerals, &c., were reserved to them, their heirs and assigns, and they had a right to take and carry away the minerals, &c., not thereby injuring, prejudicing, or obstructing the canal, towing paths, &c.

By s. 74 (1) the right of fishery was preserved to the land-owners through whose lands the canal was made.

(1) Sect. 74 of the Act of 6 Geo. 3, c. xcvii., provides as follows: "Provided always, and it is hereby enacted and declared, that the lord and lords, or owner and owners, of all and every manor and manors through which the said intended cut or canal shall be made, shall have and be intitled to the sole, several, and exclusive right of fishery, of and in so much of the said cut or canal, trenches and sluices, as shall be made over or through the common or waste lands within his, her, or their, manor or manors respectively; and also in, over, or through, any other lands or grounds lying within any such manor or manors wherein such lord or lords, or owner or owners, now have or hath, or are or is intitled to the right of fishery in the pits, ponds, and waters, now being in such last-mentioned lands or grounds respectively; and that the owner or owners of all other lands or grounds through which the said cut or canal shall be made, shall also have and be intitled to the like sole, several, and exclusive, right of fishery of and in so much of the said cut or canal, trenches and sluices, as shall be made in, over, or through his, her, or their lands or grounds respectively, so as in the use and exercise of the said right of fishery, the said navigable cut or canal, trenches and sluices, and the towing paths, banks, or other works and conveniences hereby authorized to be made, shall not be prejudiced or obstructed, or any water drained or exhausted from or out of the said cut or canal trenches, or sluices; and so as the said company of proprietors, their successors, or assigns, or their agents, servants, or workmen, or any of them, shall not be liable to any penalty, action, or prosecution, for or by reason of the taking or destroying of any fish in the said cut or canal, trenches, or sluices, which shall be taken, killed, or destroyed, through or by means of the letting off the water out of the said cut or canal, trenches, or sluices, for or upon account of any repairs or works to be done in or about the same; and also that it shall and may be lawful for the lord or lords of such manor or manors, and the owner or owners of such grounds, being qualified by law so to do, to take and kill game upon so much of the said cut or canal trenches, sluices, towing paths, and other the lands or grounds to be set out for the use of the said navigation, as shall be made through their respective lands or grounds as aforesaid; any thing herein contained to the contrary notwithstanding."

EVE J. 1911 — STAFFORDSHIRE AND WORCESTERSHIRE CANAL NAVIGATION v. BRADLEY.

On September 30, 1771, in pursuance of their powers under the Act, the plaintiffs agreed to purchase from the Hon. Thomas Clifford (who was owner of the manor of Tixall) certain lands in the manor of Tixall, between Heywood Mill and Tixall Bridge, for the construction of the northern end of the canal, towing path, and works, in the parishes of Tixall, Colwich, and Stowe. In 1829 the manor of Tixall and other lands through which the canal was made became vested in Sir Thomas Aston Clifford Constable. By a deed of release, dated March 31, 1845, Sir Thomas Aston Clifford Constable conveyed to the uses of a settlement dated November 8, 1828, the manor, advowson, and mansion house and demesne lands of Tixall with the rights, royalties, and appurtenances thereto belonging, and all that the free fishery or exclusive right of fishery in the rivers Sow and Trent, and all messuages, farms, lands, and hereditaments therein mentioned and specified in two schedules thereto, and all houses, outhouses, edifices, ways, paths, waters, watercourses, warrens, commons, customs, tolls, duties, "fisheries," profits, commodities, advantages, emoluments, rights, royalties, hereditaments and appurtenances whatsoever to the said manor, advowson, fishery, messuages, and other hereditaments "respectively belonging, or in anywise appertaining," or with the same, or any of them, used, occupied or enjoyed, or accepted, deemed, or known as belonging to the same. Under this settlement of November 8, 1828, the first life estate was limited to the second Lord Talbot, and on his death the premises devolved to the third Lord Talbot, who established his title as eighteenth Earl of Shrewsbury. In May, 1877, the premises which had been resettled passed to the twentieth Earl of Shrewsbury, and were disentailed by him in November, 1881.

By an indenture of lease, dated July 23, 1910, made between the twentieth Earl of Shrewsbury and William Richard Taylor and John Masters for and on behalf of the Stoke-on-Trent Angling Society, the Earl granted to the lessees, for and on behalf of themselves and others the duly qualified members of the Stoke-on-Trent Angling Society, the full, free, and exclusive right, liberty, and authority to fish for, capture, take and carry away all fish in that portion of the canal lying between

Heywood Mill and Tixall Bridge for the term of one year from June 24, 1910, and so on from year to year, at a rent of 46*l.* a year; and the lessees covenanted so to exercise their rights thereby granted that the towing paths, banks, and other works of the canal should not be prejudiced or obstructed. The Stoke-on-Trent Angling Society was limited to 100 members.

The defendant, Daniel Bradley, was a member of the society, and on August 9, 1910, without the leave or licence of the plaintiffs, he entered upon the towing path and fished therefrom in the canal near Tixall Bridge. He claimed a right to do so under the lease to the angling club. The plaintiffs denied this right, alleged damage to the towing path, and claimed a declaration that the defendant was not entitled, without their consent, to fish in the canal from any part of the towing paths, banks, or other works of the canal in the parishes of Tixall, Colwich, and Stowe. They also claimed an injunction to restrain the defendant from thus trespassing on the towing path for the purpose of fishing; damages; and costs.

It appeared that in making the canal an embankment about 10 feet high was made across a valley having a slope from Tixall Hall on the north to the river Sow on the south. When the canal was filled this embankment caused the water to overflow on the north side of the canal and thus formed what was called the Tixall Broadwater and was the portion leased for fishing. The land on both sides of the canal as far as the broadwater extended belonged to the Earl of Shrewsbury.

In 1903 the general manager of the canal agreed with the angling society for the payment of 5*l.* a year for the use of the towing path for fishing. This was paid until December 31, 1908, when the canal company asked for a higher payment, which was not acceded to, and the members of the society ceased fishing from the towing path altogether, but continued to fish from the north side of the canal, and from boats.

P. O. Lawrence, K.C., and *H. Stuart Moore*, for the plaintiffs. The question is whether the defendant is entitled to fish from the towing path on the bank of the canal. The plaintiffs' contention is that, although fishing rights have been granted by the original

EVE J. 1911 — STAFFORDSHIRE AND WORCESTERSHIRE CANAL NAVIGATION v. BRADLEY.

Act of 1766 (6 Geo. 3, c. xcvii.) to persons through whose lands the canal was constructed, no right is given to fish from the towing path, and such a right cannot be implied. Fishing must be from the other or northern bank, or from boats, subject always to no obstruction being caused to navigation. The towing path is the plaintiffs' soil, and if the defendant's society wish to come upon it they must either pay rent, or keep away. The plaintiffs further contend that the defendant must fail, upon the ground that Lord Shrewsbury, through whom he claims, had no title to the fishery, as it never passed to him in express words and cannot be held to pass under the general words of the deed of March 31, 1845. The defendant's claim, under the Act, depends upon s. 74. But the words there used are "owner or owners" without "heirs and assigns." There is no question here of any way of necessity: *Wheeldon* v. *Burrows* (1); *Ray* v. *Hazeldine* (2); *Rex* v. *Ellis* (3); *Hanbury* v. *Jenkins* (4); Woolrych on Waters, 2nd ed. p. 167. The restriction which the Act contains against obstructing the navigation cannot, by implication, give a right to go upon the towing path. Fishing in the canal from boats may interfere with navigation, and it is that at which the restriction is aimed. It is not likely that a right to go on the towing path would be given without express mention, and there is nothing in the language of the Act from which it can be inferred: *Ecroyd* v. *Coulthard* (5); *Grand Union Canal Co.* v. *Ashby*. (6) When rights over the towing paths are given, express mention of them is made, as in ss. 45, 52, 55, 60, and 73 of the Act. But, even assuming the Act to be against the plaintiffs, the defendant cannot succeed. He seeks to justify, as a member of the society of anglers, under the lease of July 23, 1910, and the society seeks to justify under the grant to Lord Shrewsbury by the deed of March 31, 1845. But the fishery is an incorporeal right of fishery in gross. Its origin is known, as it was newly created by the Act when the water for the first time flowed when the canal was constructed. As a

(1) (1879) 12 Ch. D. 31.
(2) [1904] 2 Ch. 17.
(3) (1813) 1 M. & S. 652.
(4) [1901] 2 Ch. 401.
(5) [1897] 2 Ch. 554; affirmed [1898] 2 Ch. 358.
(6) (1861) 6 H. & N. 394

fishery in gross it cannot be prescribed for, and must be conveyed by deed. It passed, if at all, under the general words of the deed of 1845. But we submit that it did not pass, because a right in gross cannot pass under general words: *Morris* v. *Dimes*. (1) It cannot be a right appurtenant to the land of a riparian owner, because the claim is of a right to take every fish without stint and is not limited to the necessary requirements of the owner of the land: *Shuttleworth* v. *Le Fleming*. (2) A claim to eat or take to market the fish, which is the claim made here, is entirely inconsistent with an appurtenant right: *Edgar* v. *Special Commissioners for English Fisheries* (3); *Earl of Chesterfield* v. *Harris*. (4) The right is not claimed for Lord Shrewsbury as being owner of Tixall Manor, but as a right in gross which can be let to other people. If the right of fishery did not pass to Lord Shrewsbury under the deed of 1845, he could not grant a lease of it to the society.

Further, the defendant claims as a member of a society which, as agent for its members, has for five years paid rent to the plaintiffs for "compensation for trespass." There is therefore an estoppel which prevents the claim from succeeding.

L. Sanderson, K.C., and *Gerard S. Sanders*, for the defendant. It is an action simply for trespass, and turns upon a question of title. We claim a statutory title to fish from the towing path of the canal under s. 74 of 6 Geo. 3, c. xcvii. That section reserved the exclusive right of fishery to the owners of the lands through which the canal was to be made. We ask the Court to come to the conclusion that there is an implied grant to go upon the towing path in order to exercise the right of fishery. The Court must presume a reasonable grant, not an illusory one, and the servient tenement is protected by the words at the end of s. 74 to the effect that the right thereby granted is not to be exercised so as to prejudice or obstruct the towing path. The right is not claimed as a way of necessity.

The other sections of the Act which were referred to, where rights to go upon the towing path are mentioned, do not really

(1) (1834) 1 Ad. & E. 654.
(2) (1865) 19 C. B. (N.S.) 687, 708, 709.
(3) (1870) 23 L. T. 732.
(4) [1908] 2 Ch. 397; affirmed [1911] A. C. 623.

EVE J.
1911
STAFFORDSHIRE AND WORCESTERSHIRE CANAL NAVIGATION v. BRADLEY.

affect the question. It is a question of what the Legislature intended by this s. 74. The right granted would be useless unless it could be exercised from the towing path.

[EVE J. referred to *Monmouthshire Canal and Railway Co.* v. *Hill.* (1)]

If the plaintiffs' construction is right, the fishing must be done over banks and trees on that side of the canal. With regard to the nature of the right claimed we submit that it is a right appurtenant, or capable of being made appurtenant, to the land, and is not a fishery in gross. In *Earl of Chesterfield* v. *Harris* (2) it was held that a prescription for a profit à prendre without stint and for universal purposes was unknown to the law. Here it is a right created by statute. But whether it is a right in gross or a right appurtenant, in either case it passed under the general words of the deed of March 31, 1845, more especially under the words fisheries to the manor and hereditaments "belonging or in anywise appertaining": *International Tea Stores Co.* v. *Hobbs* (3); *Brett* v. *Clowser.* (4)

Then, thirdly, this licence to fish can properly be the subject of a lease. It is not unlimited. The members of the club are limited in number, and the fishery is to be carried on so as not to prejudice or obstruct the towing paths. The Act itself imposes the limit: *Grove* v. *Portal.* (5)

Lastly, the defendant is not estopped from asserting his right owing to the fact that the angling club paid a rent for the right of going on the towing path down to 1908. The relationship of licensee and licensor terminated before the action was brought, and the defendant can assert his rights. A licensee is on the same footing as a tenant: *Doe* v. *Baytup* (6); *Snape* v. *Dobbs* (7); *Doe* v. *Smythe* (8); *Clark* v. *Adie.* (9)

P. O. Lawrence, K.C., in reply. There is no reservation of the right to go upon the towing path or banks which were conveyed in fee to the canal company. But assuming there is, the

(1) (1859) 4 H. & N. 421.
(2) [1908] 2 Ch. 397; affirmed [1911] A. C. 623.
(3) [1903] 2 Ch. 165.
(4) (1880) 5 C. P. D. 376.
(5) [1902] 1 Ch. 727.
(6) (1835) 3 Ad. & E. 188.
(7) (1823) 1 Bing. 202.
(8) (1815) 4 M. & S. 347.
(9) (1877) 2 App. Cas. 423.

defendant has not established that this is a right appurtenant or quasi-appurtenant, and if it is a right in gross it could not pass by the deed of 1845.

EVE J. The plaintiffs, as owners in fee simple in possession of the Staffordshire and Worcestershire Canal, and of the towing paths and banks adjacent thereto, by this action claim a declaration that the defendant is not entitled, without their consent, to fish in the canal from the towing path lying within certain specified limits; and an injunction to restrain him from trespassing thereon for the purpose of fishing.

The defendant asserts a right to enter upon the towing path, and to fish therefrom without the consent of the plaintiffs, and the issue I have to determine is whether or not the defendant has such right.

Prima facie, the entry of the defendant on to the plaintiffs' close is a trespass; how then does he seek to justify such entry and establish it as rightful? He puts it in this way: As a duly qualified member of an association, club, or society, known as the Stoke-on-Trent Angling Society, he says he is a cestui que trust under, and is entitled to the benefit of, a lease dated July 23, 1910, whereby Lord Shrewsbury, for the considerations therein mentioned, purported to grant to two individuals, as trustees for the society, the sole and exclusive right to fish in the canal within the limits aforesaid; and he contends further that such sole and exclusive right carries with it a right to use the towing path and banks of the canal for the purpose of exercising such right.

These contentions involve three propositions: the first, that the sole and exclusive right of fishing does carry with it a right to use the towing path and banks for the purpose of exercising the right; the second, that these rights were vested in Lord Shrewsbury at the date of the lease; and the third, that they were so vested in Lord Shrewsbury as that they could properly be made the subject of the lease. Unless the defendant succeeds in establishing each of these three propositions his defence fails.

The plaintiffs argue, first, that the defendant cannot establish

EVE J.
1911
STAFFORDSHIRE AND WORCESTERSHIRE CANAL NAVIGATION v. BRADLEY.

the first of the three propositions, and if this be so he cannot, of course, establish the second and third; secondly, that if he establishes the first of the three propositions, he fails in establishing the second and third; and thirdly, that even if he establishes the first and second, he still cannot establish the third.

It becomes necessary, therefore, to examine each of these three propositions in turn. The defendant relies on s. 74 of the Act authorizing the construction of the canal as the authority for his first proposition. By that section there is reserved, or granted,—and I think the latter is the more exact phraseology—to each owner of land through which the canal is made, the sole right of fishing in so much of the canal as is made in, over, or through his land. Such a grant would not, in itself, carry with it a right to enter upon the land conveyed to the canal company for the purpose of fishing, except, possibly, in a case (which is not this case at all) where the right was wholly incapable of being exercised without making such entry. But the section goes on to provide that the right of fishery thereby granted is to be so exercised as that the canal and the towing paths, banks, and other works, and conveniences, shall not be prejudiced or obstructed; and the defendant insists that this provision clearly contemplates and impliedly attaches to the grant of the fishery a right to enter upon and use the banks for its enjoyment.

The plaintiffs, on the other hand, argue that the right to enter upon their land, and to use it for purposes altogether alien to the statutory purposes for which its acquisition was authorized, is not a matter which the Legislature would have left to be implied; and they point to s. 50 of the Act, as shewing the use to be made of the towing path, and to ss. 45, 60, 73, and the concluding part of this very section, 74, as instances where a statutory right to go upon or use the towing path and banks is expressly conferred.

I do not think that any of these last-mentioned instances are in pari materia with the rights dealt with in the earlier part of s. 74. Under s. 45 free passage over the canal is secured for certain merchandise and commodities intended for certain individuals, and the words in that section as to the free use of towing paths, wharves, and quays are inserted, in my

opinion, to make it quite clear that the goods in question are not only to enjoy the advantages of free passage, but are to be exempt from landing, wharfage, and other terminal charges. Sect. 60, which recognizes the right of landowners to erect upon their own land near the canal, warehouses, wharves, quays, and landing places, authorizes them to unload from the waterway, into these warehouses and wharves and on to these quays, goods coming by the canal, and in so doing to use the banks of the canal intervening between the waterway and the warehouses, wharves, or quays, thereby in effect, according to the decision in *Monmouthshire Canal and Railway Co.* v. *Hill* (1), giving them the free right to use the towing path, which may be on the top of, or, indeed, may itself be one of, those banks. The concluding part of s. 74 deals with a subject-matter—the pursuit and killing of game—in respect of which it was necessary, as it seems to me, to enumerate in detail the parcels over which the right was exercisable. I do not therefore gather much assistance from collating the earlier part of s. 74 with the later part, or with the other sections relied upon by the plaintiffs; and I am left to construe it, having regard to its wording, to the subject-matter with which it deals, and to such circumstances as must be taken to have been in the minds of those responsible for it. Among such circumstances I should include, first, the common knowledge that a canal is practically a shallow elongated pond, in which, as a rule, having regard to its narrow width, to the absence of any stream or motion in the water, to its shallowness, and to the rapid accumulation of mud in it, the employment of a boat for fishing would be quite superfluous, and the idea of wading ludicrous. Secondly, the certainty that in many cases the canal would be constructed along the extreme edge of the vendor's land, and with a towing path or some other artificial bank intervening between the waterway and his retained land. Thirdly, the probability that in many places the waterway would be bounded on each side by retaining banks entirely cutting it off from the adjoining lands; and fourthly, that this is a section inserted for the benefit of the landowners, and I must assume they were bargaining for a substantial and exercisable right, not

(1) 4 H. & N. 421.

EVE J.
1911
STAFFORDSHIRE AND WORCESTERSHIRE CANAL NAVIGATION v. BRADLEY.

for an illusory privilege only to be enjoyed if and so far as its enjoyment was not rendered impracticable by the canal company.

Taking all these matters into consideration, I am of opinion that s. 74 does confer upon the grantees of the exclusive fishery a right to use the towing paths and banks for the exercise of that right of fishery. The defendant therefore has, in my opinion, succeeded in establishing his first contention.

Passing on to examine how far he has succeeded in establishing his second contention it is necessary, in the first place, to ascertain what is the nature of the right granted to the landowner by this s. 74. Putting it shortly, it is a right to take from that reach of the canal which fronts his land all the fish to be found therein, without stint, without any restriction as to the disposition of the fish, and without any relation to the needs of the land in respect of which the right is granted, or of its owner or tenants.

Such being the nature of the right, is it one which, according to English law, can be appurtenant to land? The answer to that question is to be found in a recent authority, *Earl of Chesterfield* v. *Harris* (1), which has been dealt with exhaustively in the course of the arguments, and to which it is not necessary for me to refer again at length. But the answer is clear. I take it from the judgment of the Master of the Rolls. After dealing with the question whether the facts there proved constituted a sufficient foundation for the grant which the defendants alleged ought to be presumed and pointing out that in his opinion they did not, he proceeds (2): "In the second place, assuming this difficulty"—that is the difficulty created by the facts proved—"to be got over, I think our law does not allow such a profit à prendre. It is claimed not as a right in gross, but as a profit à prendre in a que estate, or in other words as appurtenant to land. Apart from authorities, the very idea of a que estate seems to involve some relation between the needs of the estate or its owner and the extent of the profit à prendre." Now, here, the only relation between the estate or its owner and the profit à prendre is that the extent of water in which the right is

(1) [1908] 2 Ch. 397; [1911] A. C. 623. (2) [1908] 2 Ch. 410.

exercisable is determined by the frontage of the estate on the canal, and that is not the sort of relationship to which the Master of the Rolls is referring. He is referring to a relation between the needs of the estate or its owner and the extent of the profit à prendre. It follows, therefore, that I am bound to hold that a right of the nature of that created by s. 74 cannot be treated as a profit à prendre, but is a right in gross. But it has been argued on behalf of the defendant that although a grant of such a profit à prendre could not be presumed because the law of England does not allow such a profit à prendre, it does not follow that Parliament, which is all-powerful, may not have intended to create such a right, and that Parliament has in fact done so by this statute. I cannot accede to this argument; I am here called upon to construe a section which I am informed, and my own research confirms the information, is more or less a common form section in Acts authorizing the construction of canals. It is I think impossible to discover anything in the section indicative of an intention on the part of the Legislature to make a wholly new departure and to create a right which down to that time (1771) had not, and down to the present day has not, been recognized as capable of being created under English law. I think the right granted by s. 74 is purely and simply a fishery in gross. It is not appurtenant, or capable of being made appurtenant, to land, and therefore is not capable of being reputed to be appurtenant to land. That being so, the question raised by the second proposition is whether Lord Shrewsbury, whose title to the estate commences with a deed executed in 1845, has ever acquired this right. It is conceded that if he has done so it must have been by that deed. The relevant parts of the deed have been read more than once, and I need not read them again; but it is to be observed that thereby is conveyed in terms another several fishery, and that the only words of the deed by which it is suggested that this particular right of fishery could have passed are general words following the description of the estate. But having held that this right is not appurtenant, nor capable of being appurtenant, or of being reputed to be appurtenant to the estate, I cannot find any words in the conveyance capable of passing it, and I

EVE J. 1911

STAFFORDSHIRE AND WORCESTERSHIRE CANAL NAVIGATION v. BRADLEY.

am forced to hold that it has never in fact passed to Lord Shrewsbury.

The result is that the claim by which the defendant seeks to establish his position breaks at the link involved in his second proposition—the proposition that this right was vested in Lord Shrewsbury by the conveyance of 1845.

That really disposes of the case; because, as I have pointed out, unless the defendant can succeed in establishing each of his three propositions his justification fails. But further points were argued to which I will refer, although, inasmuch as I have not heard Mr. Lawrence reply fully upon them, I express such opinion as I have arrived at with that reservation. Assuming that the subject-matter of the grant was capable of being made appurtenant to the land, and did therefore pass by the conveyance of 1845 to Lord Shrewsbury, the further question would arise whether it was competent for him, under the terms of the grant, to license the members of the club to exercise the rights vested in him. As at present advised I do not see why he should not do so. It is true (as has been pointed out on behalf of the plaintiffs) that the effect of the granting of such licences, especially if they ran into considerable numbers, might be to impose a very serious burden on the canal company and their property. But, in the first place, one cannot fail to appreciate that the number of licences must be limited by the practical question how many fishermen are likely to be able to fish the water with a fair prospect of that moderate and modest success which seems to satisfy, nay, even to gladden the heart of, a canal fisherman. And again (and this is really the answer to the suggestion that the multiplication of licences is unduly burdensome) it must never be lost sight of that the right must be exercised with due regard to the paramount duty of the canal company to keep the canal and towing paths in a proper condition for navigation, and to the obligation resting on those enjoying the fishery to do nothing to prejudice or obstruct the company in the discharge of that duty.

Then a further point was raised, that the members of this club, including the defendant, had for many years recognized and acknowledged the exclusive title of the canal company to the towing path by paying to them an annual sum of 5*l.* for the

privilege of being allowed to fish from the path; and it was urged that no one who, as a member, had been party to such a payment, and who must thereby be taken to have admitted that he and his co-members were on the towing path by leave and licence of the canal authority, could now be heard to assert a right to use the towing path without the consent and in spite of the dissent of the canal company. I think the answer to that is that, although the licensee cannot be heard to dispute the title of the licensor, so long as the relationship of licensee and licensor continues, there is no continuing disability affecting the licensee when the relationship has determined, and from that time he is as competent to assert his rights as any one else.

The result of the conclusions at which I have arrived is that the defendant cannot justify the trespass; and in that position of affairs it only remains for me to make the declaration asked for by the plaintiffs, to grant the injunction, and to order the defendant to pay the costs of the action.

Solicitors: *Ullithorne, Currey & Co., for Neve, Thorneycroft & Co., Wolverhampton; Norris, Allens & Chapman, for R. T. Adderley, Longton.*

G. M.

JOYCE J.
1911
Nov. 10, 14.

In re WEBSTER.
PEARSON *v.* WEBSTER.

[1911 W. 1182.]

Will—Charity—"The Ormond Home for Nurses"—Maternity Nurses for Poor People—Testatrix herself the Home—Charitable Intent—No Lapse—Good Charitable Gift.

The testatrix bequeathed her estate to "The Ormond Home for Nurses," and added directions for carrying on the home "for the next few months."

The testatrix was a qualified midwife, who for moderate fees attended maternity cases among the working classes and poor people of Chelsea. She employed at weekly salaries several other trained midwives, who resided with her and attended cases as required, the fees being received by the testatrix. She also received a few pupils and trained nurses desirous of obtaining midwifery experience, who resided with her, and the fees paid by the former and earned by the latter were received by the testatrix. By means of the fees so paid and her own small income she just managed to carry on her establishment, which she called "The Ormond Home for Nurses":—

Held, that although there was no person or institution which could properly be called "The Ormond Home for Nurses," the testatrix clearly intended something to be carried on for the benefit of the patients requiring nursing, and that in the circumstances there was a good and valid charitable gift and a scheme was directed.

Adjourned Summons.

By her will dated November 16, 1910, the testatrix, Margaret Ainslie Webster, appointed the plaintiff, Dr. Pearson, and another medical man her executors, and then made the following disposition: "I give and bequeath unto the Ormond Home for Nurses any money that comes to me now from my father and will come from my mother also the furniture—my relations having taken out anything they may wish to have. Arrangements must also be made to carry on the home for the next few months with Mrs. Bell in charge. The money that comes in from the district goes towards the expenses of the upkeep and debts not paid by me must be paid. If necessary a committee might be formed of Dr. Hall Walker and several local Chelsea doctors."

The testatrix died on the same day on which she made her will, which was proved by the plaintiff alone, who subsequently took

out this summons for the determination (inter alia) of the question whether the above was a good charitable gift.

From the evidence it appeared that in the year 1892 the testatrix, who had become a duly qualified midwife, took No. 8, Durham Place, Chelsea, on a tenancy agreement, and thenceforward resided there until her death, rendering her services as midwife at moderate fees (often paid by instalments) to the working classes and poor people. Being unable to attend to all the cases to which she was called, the testatrix employed three or four trained midwives at weekly salaries of 10*s.* 6*d.*, who resided with her and attended cases as required. The fees received for such attendances were paid to the testatrix.

The testatrix also from time to time received in her house a few trained nurses desirous of obtaining midwifery experience, who would stay for periods of a year or less and receive board and lodging and midwifery teaching, but no salary, and in return would attend ordinary nursing cases, the fees for which would be paid to the testatrix. She also from time to time received a few pupils, who resided with her and paid fees, and she provided lectures by a qualified medical practitioner for these pupils.

The testatrix had a private income of 30*l.* a year, and with the assistance of this she was just able to carry on her work and pay expenses and support herself. She called her establishment "The Ormond Home for Nurses."

A. L. Ellis, for the plaintiff, stated the case.

Bryan Farrer, for the defendant next of kin. This home was not a charity. It may have been benevolent, but it was not charitable. The testatrix was herself the home, and when she died the home ceased to exist. It was really a profit-making institution. This is not a good charitable gift, and there is a lapse: *In re Joy.* (1)

Sargant, for the Attorney-General. This is a good charitable gift. The institution, as carried on, was in fact a charity. It helped people who were in need of assistance. In *In re Joy* (1) Chitty J. held that there was not a charity at all. But here the testatrix was carrying on a regular charitable institution, and she

(1) (1888) 60 L. T. 175.

JOYCE J. 1911 — WEBSTER, *In re.* PEARSON *v.* WEBSTER.

shews by her will that she meant her property to be applied in carrying on such a charitable institution in future for the poor people of Chelsea, and not with any object of private gain, and she gives an endowment for that purpose. If the facts in *In re Joy* (1) had justified it, the judge would have held the gift a good charitable gift.

[JOYCE J. This work seems to me to be charitable, but the difficulty is that there is no such person or society.]

In re Mann (2) meets that difficulty. The testatrix makes this gift for the purpose of carrying on the charitable work in which she was engaged at the time of her death; if not there is a general charitable intent, and there ought to be an application cy-près.

Bryan Farrer in reply. Before there can be a cy-près application there must be a general charitable intent, and not merely a gift to an institution which no longer exists but had died with the testatrix. This is a case of lapse: *In re Joy.* (1)

[JOYCE J. referred to *Brownjohn* v. *Gale.* (3)]

In *In re Mann* (2) there was a general charitable intent. In this case the testatrix did not give away anything when the home was being carried on; she merely supplied midwives for what she could get.

[JOYCE J. The testatrix did not intend a lapse; she shews that she meant the home to be carried on.]

For a little time, because there were fees to be got in, and debts to be paid, and the house got rid of. In *In re Mann* (2) it was not suggested that there was no Mann Institute, and that case does not touch this.

JOYCE J. The testatrix in this case was a lady who in middle life, having qualified herself as a midwife,—I am taking this from the executors' affidavit—considered that she would be doing a good work by providing the services of qualified nurses, by which I mean midwives or maternity nurses, for women of the working classes and poor people in maternity cases at a small charge. With that view she set up an establishment, I may call

(1) 60 L. T. 175. (2) [1903] 1 Ch. 232.
(3) [1869] W. N. 133.

it, where she maintained qualified trained nurses, that is midwives, to act with her and attend such cases as I have mentioned. The women who were attended as patients were to pay a small sum for what was done, varying, according to their means or position, from about 7*s.* 6*d.* to sometimes as much as a guinea. These payments were mostly by weekly instalments, a weekly instalment being sometimes as low as 6*d.* a week. The poorest women of the neighbourhood, who were unable to pay for a doctor, used to apply to this place in connection with St. George's Hospital, which in suitable cases would provide for medical attendance, the testatrix, or some of the nurses who were under her charge, doing the nursing for the small charge of 7*s.* 6*d.* a week or some trifling sum.

The testatrix designated her establishment "The Ormond Home for Nurses," and, as is usual with hospitals which take medical students as pupils, young women were received by her and trained for this kind of work. She expended her own slender income and what she collected from the patients and pupils in maintaining the place, and she just about managed to make both ends meet.

I think it was hardly denied before me that what this lady did principally, if not altogether, from philanthropic motives, was in ordinary parlance a charitable work, the object and result being the relief of human suffering. But it is alleged, or it was contended, that it was not charitable in a legal sense because of the small payments made by the women who received the benefits of the nursing. There are hospitals where patients pay something according to their means, but that does not prevent such a hospital from being a charity in the legal sense; nor do I think that a school would be prevented from being a charity because the boys who received its benefit paid for their education a moderate sum proportionate to their means.

Then in November, 1910, this lady, without legal assistance, made her will, by which she, putting it shortly, gave or made a disposition in favour of her establishment—which is a word that I think may be used in reference to it—"The Ormond Home for Nurses." In her will she has made a bequest to "The Ormond Home for Nurses." Of course there was no

JOYCE J. 1911 WEBSTER, *In re.* PEARSON *v.* WEBSTER.

person, and in strictness there was no institution, which could be properly called "The Ormond Home for Nurses." If that gift to "The Ormond Home for Nurses" be not a charitable gift it must fail.

But supposing the testatrix had said expressly and in so many words "I direct my property to be applied in continuing the work which I am carrying on at the place called 'The Ormond Home for Nurses,'" or suppose she had even said "I leave my property for the commencing and carrying on in Chelsea of a work similar to that which I have been carrying on at 'The Ormond Home for Nurses,' and I wish the patients to be charged a small sum for the benefits they receive according to their means," her object clearly being in the circumstances to provide nursing for the working women of the poorer classes—which, as I said at the beginning, I take from the documents which I have before me—the position would be clear. If this testatrix has not said that expressly, has she not said it in effect? Well, I think that, looking at the whole of this will, she has said it.

She begins by appointing two doctors as executors. Then she gives a bequest to "The Ormond Home for Nurses"; and then she says arrangements must be made to carry on the home for the next few months. By that I do not think she meant it was not to be carried on for more than a few months, but that for the next few months Mrs. Bell must remain in charge. Her words are "Arrangements must also be made to carry on the home for the next few months with Mrs. Bell in charge." Then she continues, "The money that comes in from the district goes towards the expenses of the upkeep and debts not paid by me must be paid. If necessary a committee might be formed" of several local doctors. She intended something to be carried on for the benefit of the patients, not to make a profit, but for the benefit of the patients who were to receive the nursing.

Therefore, upon the whole, I have come to the conclusion that the disposition made by this testatrix of whatever is disposed of by this disposition is a good and valid charitable gift, and I shall direct a scheme.

Solicitors: *Ellis, Peirs & Co.; Solicitor to the Treasury.*

R. M.

BRISTOL GUARDIANS *v.* BRISTOL WATERWORKS COMPANY.

EVE J.
1911
Oct. 27, 30.

[1910 G. 869.]

Water Company — Workhouse — Supply of Water for Domestic Purposes — "Private dwelling house" — Bristol Waterworks Act, 1862 (25 & 26 *Vict. c. xxx.*), *ss.* 68, 73 — *Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *s.* 53.

A water company were required by their special Act (which incorporated the Waterworks Clauses Act, 1847), at the request of the owner or occupier, to furnish to every occupier of a "private dwelling house" or part of a private dwelling-house within their area a supply of water for the domestic use of the occupier at water rates based on the rental value of the premises. The guardians, as owners and occupiers of workhouses, offices, and homes for children, within the area, claimed a supply of water for domestic purposes at the rates prescribed by the Act:—

Held, that a workhouse was not a "private dwelling house" and the guardians' claim failed.

Held, also, that the Waterworks Clauses Act, 1847, must be read subject to the provisions of the special Act, and that the right to demand, and the obligation to supply, water for domestic purposes to dwelling-houses under s. 53 of the general Act were limited by the special Act to private dwelling-houses.

Airdrie, Coatbridge and District Water Trustees v. *Flanagan* (1906) 43 S. L. R. 422, considered.

Semble, the company had power, as incidental to their main purpose, to supply water for domestic purposes to premises other than private dwelling-houses by agreement.

For many years past the plaintiffs as owners and occupiers of certain workhouses and homes for the reception of pauper children, and of St. Peter's Hospital (which was used for offices and committee rooms and residence of caretaker), in the city of Bristol, had obtained from the defendants a supply of water for the use of the officers and inmates of their premises for both domestic and non-domestic purposes, paying for it by agreement by meter at a uniform rate of 1*s.* per 1000 gallons.

The defendants were a company incorporated to supply the inhabitants of Bristol with water, by and under a special Act of

EVE J.
1911
BRISTOL GUARDIANS v. BRISTOL WATER-WORKS COMPANY.

1846 and subsequent Acts, including the Bristol Waterworks Act, 1862 (25 & 26 Vict. c. xxx.). (1)

The plaintiffs' premises were within the limits of supply of the defendants.

On or about September 28, 1910, the plaintiffs requested the defendants to furnish them, for the ensuing quarter, with water for the domestic use of the officers and inmates of the premises to be paid for at water rents as specified in s. 68 of the Act of 1862, instead of as theretofore by meter. They proposed making their domestic supply distinct from that for non-domestic purposes. They accompanied their request with a tender of a sum calculated to be the amount of the water rents in accordance with s. 68.

The defendants declined to accept the tender, and refused to supply the plaintiffs with water for domestic purposes except on the terms of it being paid for by measure. They denied the right of the plaintiffs, upon the true construction of the Acts, to be supplied with any water at water rents.

The plaintiffs thereupon commenced this action claiming a declaration that they were entitled to be furnished by the defendants, in accordance with the Act of 1862 and the Acts incorporated therewith, with a proper and sufficient supply of water (separate from any supply by meter for non-domestic purposes) for domestic purposes to their premises (Eastville Workhouse and master's house thereto, Stapleton Workhouse and casual wards thereat, St. Peter's Hospital, children's homes at Fishponds, and Southmead Workhouse); and that the defendants were bound to supply such water at the rates prescribed by s. 68 of the Act of 1862.

(1) The Bristol Waterworks Act, 1862, s. 4, enacted that the Waterworks Clauses Act, 1847, ("except where otherwise specially provided by this Act,") was incorporated therewith.

Sect. 68: "The company shall, at the request of the owner or occupier, furnish to every occupier of a private dwelling house or part of a private dwelling house, in any public street or road within the limits of this Act . . . . a sufficient supply of water for the domestic use of every such occupier at annual rents or prices (hereinafter called 'water rents') not exceeding" the sums specified which were based on the rental value of the premises.

Danckwerts, K.C., and *E. H. C. Wethered*, for the plaintiffs. Under s. 53 of the Waterworks Clauses Act, 1847 (1), there is power for the owner or occupier of "any dwelling house" to compel a supply of water to be furnished to him for domestic purposes. That Act must be read into the special Act of 1862. There is no obligation on the defendants to supply water for domestic purposes to any but a dwelling-house. The authorities clearly shew that workhouses are dwelling-houses, the pauper inmates being statutory guests: *Liskeard Union* v. *Liskeard Waterworks Co.* (2); *Cooke* v. *New River Co.* (3); *South-West Suburban Water Co.* v. *St. Marylebone Union* (4); *Frederick* v. *Bognor Water Co.* (5); *Metropolitan Water Board* v. *Colley's Patents* (6); *Chester Waterworks Co.* v. *Chester Union.* (7) A difficulty is created by the fact that s. 68 of the Act of 1862 uses the words "private dwelling house" instead of "dwelling house," as in the Act of 1847; but really the word "private" does not add any force to the words "dwelling house." That was the opinion of some of the judges in *Airdrie, Coatbridge and District Water Trustees* v. *Flanagan.* (8) The workhouses are homes for the paupers and "private dwelling houses" of the guardians. The plaintiffs therefore, as owners of the premises, are entitled to a supply of water for domestic purposes on the footing of the rates mentioned in s. 68 of the Act of 1862.

Upjohn, K.C., and *D. M. Kerly*, for the defendants. The Court must be satisfied that the plaintiffs are owners or occupiers of "private dwelling houses" before they can be brought within the benefit of s. 68. So far from that, a workhouse is pre-eminently a public institution, a place to which the destitute are brought under certain rights of admission, and

(1) The Waterworks Clauses Act, 1847, s. 53, enacts: "Every owner and occupier of any dwelling house or part of a dwelling house within the limits of the special Act shall, when he has laid such communication pipes as aforesaid, and paid or tendered the water rate payable in respect thereof, according to the provisions of this and the special Act, be entitled to demand and receive from the undertakers a sufficient supply of water for his domestic purposes."

(2) (1881) 7 Q. B. D. 505.

(3) (1888) 38 Ch. D. 56.

(4) [1904] 2 K. B. 174.

(5) [1909] 1 Ch. 149.

(6) [1911] 2 K. B. 38; affirmed [1911] W. N. 211.

(7) (1908) 98 L. T. 701.

(8) 43 S. L. R. 422.

EVE J.
1911
BRISTOL GUARDIANS v. BRISTOL WATER-WORKS COMPANY.

which they cannot leave without permission. It would be a strange private dwelling-house in which an infirmary and mortuary are found, and a travesty of language to speak of a workhouse as such. The reading of s. 68 which the plaintiffs suggest is really that the owner or occupier of "any premises" has a right to water for domestic purposes at the specified rates. There is no obligation on the defendants to supply workhouses with water, it is a matter for private bargain. The only obligation on the defendants to supply water for domestic purposes is contained in s. 68, and is limited to premises which are "a private dwelling house or part of a private dwelling house." Workhouses are not private dwelling-houses of the plaintiffs'; they are public institutions vested in a public authority for public purposes, and are in no sense private. Though it has been held that the inmates of a workhouse are to be treated as one family,—*Liskeard Union* v. *Liskeard Water-works Co.* (1)—yet no one member of that family has any voice in the admission of any other member, nor any choice as to his or her company at meals, and any member may be set to work at an occupation with which he is familiar or sent compulsorily to a bath. The institution is carried on at the public expense, and has nothing private about it either in idea or in the nature of its occupation: see definition of "private" in the Oxford and the Century Dictionaries. In *Airdrie, Coatbridge and District Water Trustees* v. *Flanagan* (2), under the section of an Act practically the same as s. 68, the meaning of "private dwelling house" was explained, and it was held not to include a public-house; and under the Public Health (London) Act, 1891, s. 24, it was held not to include a block of residential flats—*Queen Anne Residential Mansions and Hotel Co.* v. *Westminster Corporation* (3)—nor a club: *McNair* v. *Baker* (4); yet a member of a club has much greater privacy than an inmate of a workhouse.

There is nothing in the context to give "private dwelling house" in s. 68 a meaning different from its ordinary meaning. To succeed, the plaintiffs must make out that any dwelling-house, whether private or a public institution, is a "private dwelling

(1) 7 Q. B. D. 505.
(2) 43 S. L. R. 422.
(3) (1901) 46 Sol. J. 70.
(4) [1904] 1 K. B. 208.

house," provided the supply of water is required for purposes usually called domestic. Sect. 68 uses the same words, i.e., "private dwelling house," as the corresponding section of the defendants' earlier Act of 1846, not adopting the language—merely "dwelling house"—of s. 53 of the general Act of 1847. The plaintiffs rely on s. 73 of the Act of 1862 (1), and say that, unless there is an obligation under s. 68 to furnish them with a supply for domestic purposes, there is no power to require a supply for domestic purposes at all. Sect. 68 and s. 73 must be read together. Any public institution has to take its supply of water, whether for domestic or other purposes, either under s. 73 or otherwise by agreement. The scheme of the Act is that it is only the owner or occupier of a private dwelling-house who is to pay upon rental value for his domestic supply. The plaintiffs, in relying upon s. 73, must find something there to justify giving to three ordinary English words in s. 68 a meaning different from their ordinary meaning. To include in "private dwelling house" such a public institution as a workhouse would be "to interpret plain and clear words in a mode directly contrary to their ordinary sense," which Parke J., in *Miller* v. *Salomons* (2), says "it is not for us to" do. There is no context in the Act of 1862 to cut down the ordinary meaning of the words; nor are there any substantive enactments or repealing provision in the defendants' later Acts to give them any other meaning.

Sect. 4 of the Act of 1862 contains a special provision which excludes the general provision of the general Act of 1847. Thus the plaintiffs cannot rely on any provisions of the general Act apart from the special Act. Sect. 53, which the plaintiffs mainly rely on, cannot be incorporated as it stands with the special Act; when set alongside of s. 68, it is inconsistent and affords an exact example of variation between the two Acts, the object of

(1) The Bristol Waterworks Act, 1862, s. 73, enacts: "It shall be lawful for the company to supply any person with water for other than domestic purposes at such rate and upon such terms and conditions as shall be agreed upon between the company and the persons desirous of having such supply of water; but such last-mentioned supply shall not be furnished by the company so as to prejudice or diminish the full and adequate quantity required for domestic purposes."

(2) (1852) 21 L. J. (Ex.) 161, 192.

EVE J.
1911
BRISTOL GUARDIANS v. BRISTOL WATER-WORKS COMPANY.

both being the supply of water to dwelling-houses, but that supply being limited by s. 68 of the special Act to private dwelling-houses. The general Act affords no provision for the supply of water for domestic purposes other than that afforded by the special Act. [On this point they also referred to ss. 35, 44, and 48 of the Act of 1862.]

As to the authorities, *Liskeard Union* v. *Liskeard Waterworks Co.* (1) throws no light, as the Court is now dealing with the question not of what are domestic purposes as distinguished from other purposes, but whether a workhouse is a public institution and not a private dwelling-house. *Chester Waterworks Co.* v. *Chester Union* (2) does not assist. *Cooke* v. *New River Co.* (3) merely decided that the plaintiff was not a consumer, and the present point was not dealt with. *South-West Suburban Water Co.* v. *St. Marylebone Union* (4) shews that the test of the right to a supply for domestic purposes is the character of user and not the character of the premises. As to dictionaries, "dwelling house" is an ambiguous expression, and, as meaning, in the old Biblical sense, a place of abiding, would include chambers or an office. But neither dictionaries nor these authorities throw any light where the expression is "private dwelling house."

Danckwerts, K.C., in reply. In *Airdrie, Coatbridge and District Water Trustees* v. *Flanagan* (5), which is the only case to be found where the words "private dwelling house" occur, the special Act did not incorporate any general enactment, as the Act of 1847 is incorporated here. The defendants' amending Act of 1865 (28 Vict. c. xxvi.), s. 2, incorporates it without qualification. The Act of 1847 makes no distinction between different kinds of dwelling-houses, and the assumption is that all dwelling-houses are entitled to a supply of water for domestic purposes at the rental value rate in accordance with s. 68 of the Act of 1862. If the defendants' contention is right, there is no power to supply water for domestic purposes to any but private dwelling-houses construed in the narrow sense in which the defendants construe the words. Their true obligation is under the Act of 1847.

(1) 7 Q. B. D. 505.
(2) 98 L. T. 701.
(3) 38 Ch. D. 56; (1889) 14 App. Cas. 698.
(4) [1904] 2 K. B. 174.
(5) 43 S. L. R. 422.

[EVE J. The plaintiffs' contention comes to this, that all the Act of 1862 did was to say that water supplied to dwelling-houses for domestic purposes should be paid for at rental value rates.]

Mainly, that was all. Sect. 68 of the Act of 1862 was badly worded, having been copied from the defendants' Act of 1846 instead of from the general Act. If, as the defendants say, s. 68 covers the whole ground, there is no supply to be had at all for non-private dwelling-houses for domestic purposes. A private Act, taxing the public, must be construed, where the meaning is doubtful, in the way which is least favourable to the party obtaining it: *Stockton and Darlington Ry. Co.* v. *Barrett.* (1) The plaintiffs ask the Court to take the view expressed by some of the judges in *Airdrie, Coatbridge and District Water Trustees* v. *Flanagan* (2) and hold that in this legislation the word "private" has no application. Guardians may have a private right of way or a private occupation road, that is, one dedicated to a private use as distinguished from being open to all the King's subjects. That is analogous to the present case. A workhouse is a private dwelling-house of the guardians, one of which they are the occupiers, —*Reg.* v. *Wallingford Union* (3)—and which they must use for the benefit of the inmates, who are a privileged class of the community, and not the whole public. The defendants are bound to supply the plaintiffs with water for domestic purposes, and must supply it at the rates specified in s. 68 of the Act, and they may supply it for non-domestic purposes under s. 73. If the workhouses are not "private dwelling houses," yet the plaintiffs are entitled to a domestic supply under s. 53 of the general Act of 1847, and the rate of payment applicable is fixed by s. 68 of the special Act of 1862; or else without any payment at all.

[*Upjohn, K.C.*, called attention to *Attorney-General* v. *Great Eastern Ry. Co.* (4) as shewing that the defendants might do whatever could be fairly regarded as incidental to, or consequential on, their main purpose.]

EVE J. For many years past the plaintiffs, who are the owners and occupiers of certain premises known as St. Peter's

(1) (1844) 11 Cl. & F. 590.
(2) 43 S. L. R. 422.
(3) (1839) 10 Ad. & E. 259.
(4) (1880) 5 App. Cas. 473, 478.

EVE J. 1911 — BRISTOL GUARDIANS v. BRISTOL WATER-WORKS COMPANY.

Hospital in the city of Bristol, used as offices and committee rooms and as a residence for a caretaker and assistant caretaker, and who are also owners (and for this purpose I will assume occupiers) of three workhouses, and of four detached houses, three of which are used for the reception of pauper children and the fourth as a laundry, have been obtaining from the defendants a supply of water by meter for domestic and non-domestic purposes. For some time past the charge for all such water has been a uniform one of 1*s.* per 1000 gallons. Two of the workhouses accommodate a very large number of inmates, one of them 1268 and the other 1231, and the annual payments made by the plaintiffs to the defendants for water, as can easily be understood, have been very considerable. The plaintiffs, with a view to reducing this expenditure, have been considering the advisability of taking all water required for domestic purposes by means of connections with the defendants' mains distinct from those by which the water required for non-domestic purposes is supplied, and if these separate connections are established they claim that they will be entitled to demand, and that the defendants will be bound to supply them with, all water required for domestic purposes at a price or rent to be ascertained and fixed by the annual rack rent or value of the premises supplied. Such a claim, if substantiated, would be calculated materially to diminish the payments made by the plaintiffs to the defendants, and, the defendants declining to recognize its validity in respect of any of the premises owned by the plaintiffs, this action has been brought for the purpose of obtaining a declaration in accordance with the plaintiffs' contentions.

The plaintiffs base their claim on s. 68 of the defendants' private Act of 1862. It has been read several times, but, so far as it is material, I perhaps may be permitted to read it once again: "The company shall, at the request of the owner or occupier, furnish to every occupier of a private dwelling house or part of a private dwelling house, in any public street or road within the limits of this Act in which or within 100 yards of which any main pipe of the company shall be laid, a sufficient supply of water for the domestic use of every such occupier at annual rents or prices (hereinafter called 'water rents') not

exceeding the following." It is not disputed that the plaintiffs are the owners of the premises in respect of which the request is made, nor does any question arise as to the respective locations of such premises and the water mains of the defendants; but the controversy turns upon the words "The company shall furnish"—omitting immaterial words—"to every occupier of a private dwelling house or part of a private dwelling house" the water. Can the pauper inmates of the workhouse, the sick at the infirmary, the children at the homes, the trained attendants, the certificated nurses, and the many others whose services are requisitioned for the control and management of such institutions as those administered by the plaintiffs, or, in the alternative, can the plaintiffs themselves, as owners and occupiers of the class of premises to which I have referred, accurately be described as occupiers of a private dwelling-house?

The plaintiffs, who argue that the question ought to be answered in the affirmative, rely upon decisions binding upon this Court wherein it has been determined that for the purposes of water supply a workhouse is a dwelling-house, that it is a dwelling-house owned and occupied by the guardians, and further that the inmates constitute one family; and they urge that it ought to be treated as a private dwelling-house, inasmuch as its hospitality is not offered to all indiscriminately, but only to those individuals who possess certain qualifications—mainly, it is admitted, of a negative character—and that admission is only to be obtained by compliance with certain regulations and the observance of certain preliminary conditions. On the other hand, it is argued on behalf of the water company that, although it may have been held that a workhouse is a dwelling-house, no Court has gone the length of holding that it is a private dwelling-house, and that so to hold would be to disregard altogether the qualification on the expression "dwelling house" introduced by the use of the word "private."

Prima facie no one I imagine would regard the expression "private dwelling house" as an appropriate description of such institutions as I have here to deal with, and in the construction of this and other similar Acts, regulating the terms and conditions upon which a necessary of life is to be supplied to dwellers

EVE J.
1911
BRISTOL GUARDIANS v. BRISTOL WATER-WORKS COMPANY.

in the statutory area, wherein the various premises affected by the legislation are necessarily of different characters and put to diverse uses, due regard must be had to the effect of any qualifying adjectives which may have been introduced for the express purpose of differentiating particular classes of premises from other classes which—but for the adjective—might have fallen within the more general description. Take this particular case; for all practical purposes the three classes of property within the limits of the company's area to which the company might be expected to supply water would be private dwelling-houses, business premises, and public institutions. Is it reasonable or permissible so to construe the words "private dwelling house" as to make them apply to and include premises falling under each of the other two categories? for this is what must follow if I hold the words to be equivalent to "dwelling house" and nothing more. The series of authorities to which Mr. Danckwerts has drawn my attention has extended the meaning of the expression "dwelling house" in Acts of this nature so as to make it include not only a workhouse, as I have already mentioned, but purely business premises, that is to say factories and the like, in which work is done during the day, but whereon no one sleeps at night, and which have been included because their use during the day almost always involves the consumption of water for purposes coming within the term "domestic purposes." The effect, therefore, of imposing on the words "private dwelling house" a meaning different from their ordinarily accepted meaning—a private residence—would, as I say, bring within the operation of this section a very large number, if not the whole, of the business premises and public institutions in the company's area. I think such a result shews that I should be stretching language beyond reasonable limits if I were to accede to such an argument.

Faced with that difficulty the plaintiffs suggest that the word "private" may be disregarded altogether—that, if the strict construction excludes from the operation of the section business premises and public institutions, it is a legitimate course to treat the word as one which really has no significance and to which no qualifying force ought to be attributed. I know of no

authority which justifies me in adopting that course. Indeed it has often been laid down that in matters of construction it is the first duty of the Court to give effect to the actual words used, and, if the words used are capable of a reasonable construction, whatever be the result of giving them that construction, that is the construction which they must bear; and, although in a case in the Scottish Courts (1) to which my attention has been directed the sheriff-substitute did express the opinion that in a Water Act the use of the word "private" before the words "dwelling house" had really no effect, and was in the expression of that opinion supported by some of the Law Lords in the Inner House, I do not, with the greatest possible respect to the sheriff-substitute and to the learned Law Lords, feel myself justified in following their example. I think it is my duty to give to the word its ordinary meaning unless there is something in the context to make that meaning repugnant to the whole purview and object of the section. I do not think there is any repugnancy here, and, affixing as I do to the expression "a private dwelling house" a meaning to which the expression "a public institution" is quite antithetical, it follows that in my opinion the plaintiffs are not entitled to the declaration for which they ask.

But it has been urged, and urged with great force, by Mr. Danckwerts that the effect of this construction is to throw back persons owning or occupying premises such as those owned and occupied by the plaintiffs upon the general Act of 1847, and to leave them still entitled under that Act to demand a supply of water for domestic purposes, and, in the absence of any provisions in the special Act fixing the rate to be paid therefor, to impose upon them no obligation to pay for it. It is rather startling if that be the true result of the legislation, but I do not think it is. It seems to me that the right under the Act of 1847 to demand, and the obligation on the company to supply, must be read subject to the provisions of the special Act, and, if the special Act, instead of giving to every owner and occupier a right to demand, and imposing upon the company corresponding obligations to afford, a supply of water, limits and defines the class of inhabitants who are so entitled, then I must read the special

(1) 43 S. L. R. 422.

EVE J.
1911
BRISTOL GUARDIANS v. BRISTOL WATER-WORKS COMPANY.

Act as controlling the general Act. Here, having arrived at what I think is the clear construction of s. 68 of the Act of 1862, it follows that in my opinion the only persons who are entitled to make that demand, and whom the company are obliged to supply, are the owners or occupiers of private dwelling-houses.

Having come to that conclusion, I do not know that I am concerned to inquire in what position it leaves those who do not come within that category, and who are not able, or willing, or in a position, to come to an agreement for a supply under s. 73, which deals with water required for purposes other than domestic purposes. It is not necessary for me to determine that question, but, inasmuch as it has been forcibly pressed upon me by Mr. Danckwerts in his argument, I may perhaps express my opinion that the special Act must be read as empowering the company to do all that is reasonably incidental to the main purpose for which it was brought into existence, that is to say, the supplying of water to the inhabitants in its statutory area. So far as the inhabitants are entitled to compel the supply of water, the supply must be made on the terms and in accordance with the section which deals with that class of inhabitants; so far as the water is required for purposes other than domestic purposes, it may be sold subject always to this restriction, that its sale must not be so large as to prejudice, injure, or diminish the supply required for domestic purposes. Subject to those restrictions, I cannot help thinking that, under the special Act, it is open to the company to supply water to persons who do not come under either s. 68 or s. 73 on such terms as the company and those persons may agree. That is the construction on which, as I gather, for many years past the parties to this litigation have been acting, because the water which has been supplied under the agreements at the rate of 1*s.* per 1000 gallons has, admittedly, been supplied for both domestic and non-domestic purposes. As I have already said, it is not necessary for me to determine this point, because, the moment I have arrived at the clear conclusion that, according to the construction of s. 68, a public institution is not a private dwelling-house the occupiers of which are entitled to demand a supply at the statutory rates,

the plaintiffs' claim to relief fails; and in those circumstances all I can do is to dismiss the action with costs.

Solicitors: *Meredith, Mills & Clark, for Osborne, Ward, Vassall & Co., Bristol; Woodcock Ryland & Parker, for Edward Gerrish, Harris & Co., Bristol.*

A. L.

BOWLES *v.* ATTORNEY-GENERAL.

[1911 B. 3883.]

Revenue—Income Tax—Super-tax—Returns before Imposition of the Tax—Customs and Inland Revenue Act, 1890 (53 & 54 *Vict. c.* 8), *s.* 30—*Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 66, 72.

The super-tax on incomes over 5000*l.* a year, first imposed by s. 66 of the Finance (1909-10) Act, 1910, and then only for the financial year beginning April 6, 1909, is additional income tax, and one of the "duties of income tax" within the meaning of those words in s. 30 of the Customs and Inland Revenue Act, 1890, and, therefore, in order to ensure the collection in due time of super-tax granted for any financial year commencing on April 6, statutory provisions relating to income tax in force on the preceding day have effect with respect to the tax so granted as if the tax had been actually imposed by Act of Parliament and the statutory provisions had been applied thereto by that Act.

Returns with a view to assessing super-tax may, therefore, be required, although no Act of the financial year imposing the tax has been passed, if, as is usual, there was an Act as to collection in force on April 5.

Quære, whether, before the Act imposing the tax has been passed, the revenue authority can assess and demand payment of it.

Super-tax was imposed for the financial year beginning April 6, 1910, by the Finance Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 35), s. 3, which provided that enactments relating to super-tax in force with respect to the tax granted for the year beginning April 6, 1909, should have effect with respect to the tax granted by the Finance Act, 1910. The Revenue Act, 1911 (1 & 2 Geo. 5, c. 2), passed in March, 1911, contained provisions with respect to super-tax, but did not impose the tax for the financial year beginning April 6, 1911. Before any Act imposing super-tax for that year had been passed the revenue authorities demanded from the plaintiff returns of his income under s. 72, sub-s. 2, of the Finance (1909-10) Act, 1910, for the purpose of assessing the tax:—

Held, that the demand was lawful.

Sect. 72, sub-s. 3, of the Finance (1909-10) Act, 1910, shews that the

PARKER J.

1911

BOWLES v. ATTORNEY-GENERAL.

Act was not intended to regulate the collection of super-tax for the financial year 1909 only, but also its collection for subsequent financial years.

THIS action was brought by Mr. Thomas Gibson Bowles against the Attorney-General, Mr. H. W. Page Phillips, and others (the Commissioners of Income Tax for Special Purposes), and Mr. A. G. Hodgson, the clerk to the Commissioners, and the plaintiff by his writ of summons claimed a declaration that a form or notice alleged to have been addressed to him by the defendant Hodgson as such clerk as aforesaid, entitled "Super-tax, Return for Assessment Year ending April 5, 1912," was null and void, and that the plaintiff was under no obligation to comply with the said notice or its requirements; and that a form entitled "Finance (1909-10) Act, 1910. Super-tax. Regulations made by the Commissioners of Inland Revenue under section 78 (2.)," and the said regulations (which were sent to the plaintiff together with the form or notice first above mentioned) were also void and of no effect; and for an injunction restraining the defendants from instituting any proceeding against the plaintiff in respect of any alleged non-compliance with the said form of notice or from otherwise acting on the same; and for an injunction to restrain the defendants from further circulating or sending to the plaintiff the said forms or notices, or either of them, or otherwise threatening the plaintiff with the penalties in the said notices referred to.

The plaintiff gave notice of motion for an injunction (1.) to restrain the defendants from instituting and proceeding against him for non-compliance or alleged non-compliance with the return or the form of regulations; (2.) to restrain them from otherwise acting on the said notice; and (3.) to restrain the defendants from further circulating or sending the forms or notices to the plaintiff or otherwise threatening the plaintiff with the penalties referred to; but it was agreed that the only point to be argued on the motion was whether the Commissioners could lawfully proceed to obtain returns as to the super-tax before any Act of Parliament imposing that tax for the financial year had been passed, and on this footing the case was argued.

The form of notice complained of was addressed to Thomas

Gibson Bowles, Esq., and headed, "Super-tax, Return for Assessment, Year ending April 5, 1912," and, so far as material, it was as follows: "Sir,—In pursuance of the provisions of the Finance (1909-10) Act, 1910, and subsequent enactments, you are hereby required by the Special Commissioners, whether you are or are not liable to super-tax, to make a return of your total income from all sources in the form on page 3 hereof, and to forward the same, duly signed by you, to this office within twenty-eight days from this date. Your attention is called to the sections relating to the super-tax printed on the 4th page hereof, and especially to section 66 (2.), which enacts that the basis of your return shall be the statutory income of the previous year, that is to say, your income 'estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts,' subject to certain specified additional deductions. Directions as to the manner in which the 3rd page of this form is to be filled in are given on page 2; and some explanatory notes have been added at the foot of that page. If you desire further information on any point, I shall be glad to furnish it on application."

Danckwerts, *K.C.*, *Manning*, and *Latter*, for the plaintiff, in support of the motion. No Act has been passed imposing income tax or super-tax for the current financial year. Budget resolutions have been passed, but the effect of these is nil. The question is whether the Special Commissioners can, before an Act has been passed imposing the tax for a year, demand returns from persons with a view to using the information contained in the returns when Parliament has imposed the tax.

Except in 1842 and two other years, income tax has been an annual tax. Super-tax was imposed, for the first time, and for one year only, by the Finance (1909-10) Act, 1910, in respect of incomes of over 5000*l.* a year, on the difference between the total amount of income and 3000*l.* a year. Sect. 65, sub-s. 1, of the Act imposed income tax for the year beginning April 6, 1909, at the rate of 1*s.* 2*d.* in the pound. Then s. 66 of the same Act provides that "(1.) in addition to the income tax charged at the rate of 1*s.* 2*d.* under this Act, there shall be charged, levied, and paid

PARKER J. 1911 BOWLES v. ATTORNEY-GENERAL.

for the year beginning on April 6, 1909, in respect of the income of any individual the total of which from all sources exceeds 5000*l.*, an additional duty of income tax (in this Act referred to as a super-tax) at the rate of 6*d.* for every pound of the amount by which the total income exceeds 3000*l.*" The tax was only imposed for one year, and the super-tax was the particular 6*d.* for the financial year beginning April 6, 1909. Sub-s. 2 of the same section provides that for the purposes of the super-tax the total income is to be estimated in the way pointed out. By the Finance Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 35), it is provided (s. 3) as follows: "(1.) Income tax for the year beginning on April 6, 1910, shall be charged at the rate of 1*s.* 2*d.*, and the same super-tax shall be charged, levied, and paid for that year as was charged for the year beginning on April 6, 1909. (2.) All such enactments relating to income tax (including super-tax) as were in force with respect to duties of income tax granted for the year beginning on April 6, 1909, shall have full force and effect with respect to any duties of income tax hereby granted."

Income tax is so much in the pound for a certain financial year, and super-tax is an additional tax for that year, and for that year only. Until Parliament has imposed the tax afresh there is no obligation to pay it or to make any returns with a view to its imposition or collection. The next provision as to super-tax is s. 72, sub-s. 1, of the Finance (1909-10) Act, 1910, which provides that "The super-tax shall be assessed and charged by the Commissioners for the special purposes of the Acts relating to income tax (in this Act referred to as the Special Commissioners)," and that refers to the super-tax mentioned in s. 66, namely, that for the year, and no one can be chargeable until the Act has been passed imposing the tax. Then s. 72, sub-s. 2, provides that "Every person upon whom notice is served in manner prescribed by regulations under this section by the Special Commissioners requiring him to make a return of his total income from all sources or, in the case of a notice served upon any person who is chargeable with or liable to be assessed to income tax under section 41 of the Income Tax Act, 1842, or section 24 of the Customs and Inland Revenue Act, 1890, as representing an incapacitated, non-resident, or deceased person,

of the total income from all sources of the incapacitated, non-resident, or deceased person, shall, whether he is or is not chargeable with the super-tax, make such a return in the form and within the time required by the notice." The last words mean that a man must make the return, although his income is not of an amount sufficient to make him liable to super-tax. It refers only to amount, and not to the case of the tax not having yet been imposed. To explain the clause further ss. 40 and 41 of the Income Tax Act, 1842, must be referred to. These made provision for the cases of corporate bodies, and societies, trustees, guardians, and the like. Sect. 54 of the Act of 1842 was only an appendix to s. 41, and was much discussed in *Ashton Gas Co.* v. *Attorney-General* (1), which decided that in arriving at the rate of dividend the profits ought to be estimated as inclusive and not exclusive of the amount payable for the year for income tax.

In all the Courts before which that case came it was laid down that the income tax was the Crown's share of the profits. In the case of a corporation an officer makes the returns. Under s. 41 of the Act of 1842 the tax is imposed on persons in respect of property which is not their own, such as that of infants, lunatics, and the like. Sect. 44 of the Act of 1842 provides for persons assessed with income tax in respect of other persons' property recouping themselves out of such property. Sect. 24 of the Customs and Inland Revenue Act, 1890, applies to the case of a man dying without having made a return. These enactments enable one to realize the meaning of s. 72 of the Finance (1909-10) Act, 1910. Sect. 72, sub-s. 3, of that Act provides that "It shall be the duty of every person chargeable with the super-tax to give notice that he is chargeable to the Special Commissioners before September 30 in the year for which the super-tax is chargeable: Provided that for the purpose of this provision July 31, 1910, shall, as respects the year beginning on April 6, 1909, be substituted for September 30 of that year." That provision seems to be a dead letter, for the enactment as to September 30 in any future year would be re-enacted by the subsequent Act imposing the duty.

(1) [1906] A. C. 10.

PARKER J.
1911
BOWLES
v.
ATTORNEY-GENERAL.

For many years before the anomalous 1909-10 Act the income tax was imposed in or before August, and s. 72, sub-s. 3, assumed that the Act would be passed before September. By s. 72, sub-s. 4, "If any person without reasonable excuse fails to make any return or to give any notice required by this section, he shall be liable to a penalty not exceeding 50*l.*, and after judgment has been given for that penalty to a further penalty of the like amount for every day during which the failure continues." It would be absurd to inflict a penalty on a man who has not made a return when no tax had been imposed on him. By s. 72, sub-s. 5, "If any person fails to make a return under this section, or if the Special Commissioners are not satisfied with any return made under this section, the Special Commissioners may make an assessment of the super-tax according to the best of their judgment." This provision may be compared with s. 111 of the Income Tax Act, 1842, enabling additional Commissioners to consider statements and make assessments. That refers to the actual duty chargeable, and was carried out by ss. 112 and 113 of the Act of 1842. The last words of s. 113 correspond with s. 72, sub-s. 5, of the Act of 1909-10. Sect. 52 of the Taxes Management Act, 1880, enables certain assessments to be made, but the Commissioners cannot make an assessment until they know on what amount duty is to be payable.

By s. 72, sub-s. 6, of the Act 1909-10, "All provisions of the Income Tax Acts relating to persons who are to be chargeable with duty, assessments, and appeals against those assessments, and to the collection and recovery of duty, and to cases to be stated for the opinion of the High Court shall, so far as they are applicable, apply to the charge, assessment, collection, and recovery of duty under this section, and the Special Commissioners shall, for the purpose of assessment, have any powers of an inspector or surveyor of taxes, and for the purpose of the representation of the Crown on any appeal before the Special Commissioners, any persons nominated in that behalf by the Commissioners of Inland Revenue shall have the same powers at and upon the determination of the appeal as a surveyor of taxes has at and upon the determination of any appeal under the Income Tax Acts." Cases for the opinion of the High Court are

dealt with by s. 59 of the Taxes Management Act, 1880, and appeals cannot come on before the tax has been imposed.

The only duty recoverable is that which has been actually imposed by statute for the year. Sect. 72, sub-s. 6, only incorporates existing provisions as to persons chargeable after imposition and assessment. There is nothing in that provision about returns, because they are already provided for by the earlier provisions of s. 72, and the returns there mentioned are those referred to in s. 66. Sect. 3 of the Finance Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 35), supports the plaintiff's contention.

The plaintiff during his absence abroad was served with a notice to make a return, and wished the Court to declare that he was not bound to make a return before another Act was passed imposing super-tax.

[PARKER J. You do not ask me to declare that it is illegal to issue the notices.]

It comes to the same thing. The people who collect the tax rely on the relation back of the taxing Act for the year when passed. The form refers to the Act of 1909-10, which only refers to the former super-tax, and as to the "subsequent enactments," there are none.

For many years income tax has only been imposed for one year. In 1845, by 8 & 9 Vict. c. 4, s. 1, it was imposed for a period of three years. It was imposed for another period of three years in 1848 by 11 & 12 Vict. c. 8. Then in 1851 it was imposed for one year by 14 & 15 Vict. c. 12, and again in 1852 for one year by 15 & 16 Vict. c. 20. Under the Act 16 & 17 Vict. c. 34, passed in 1853, the tax was imposed for seven years. In 1871 there were two Acts, 34 & 35 Vict. c. 5 and 34 & 35 Vict. c. 21. By the former, passed in March, the existing machinery was applied to ensure the collection in due time of any duties of income tax for the following financial year. By the latter Act the income tax for that year was imposed. The system of enactment shewn in Dowell's Income Tax Laws, 6th ed. pp. 641, 643, is the form now adopted. By s. 30 of the Customs and Inland Revenue Act, 1890, "In order to ensure the collection in due time of any duties of income tax which may be granted for any year commencing on April 6, all such provisions contained in any Act

PARKER J. 1911 BOWLES v. ATTORNEY-GENERAL.

relating to income tax as were in force on the preceding day shall have full force and effect with respect to the duties of income tax which may be so granted in the same manner as if the said duties had been actually granted by Act of Parliament, and the said provisions had been applied thereto by the Act." But in s. 72, sub-s. 6, of the 1909-10 Act, the only enactments applied were applied to those things already mentioned, and they did not apply to the super-tax for any subsequent year.

[PARKER J. Why should not s. 30 of the Act of 1890 apply?]

It only applies to the ncome tax as then known. The super-tax is a different tax from the income tax. All the provisions relating to income tax do not apply to super-tax. The super-tax under s. 66 is only for the particular year.

[PARKER J. Is not s. 30 of the 1890 Act kept in operation for the purpose of collecting super-tax in due time?]

The super-tax is not the same thing as income tax. The Commissioners cannot oblige any one to make a return for a tax not yet imposed. In a taxing Act the rule is that you get nothing by implication.

Sir John Simon, S.-G., *Austen-Cartmell*, and *W. Finlay*, for the defendants. The only question is whether the plaintiff is under an obligation to make a return as to super-tax, although no super-tax has yet been imposed for the current financial year. The crucial point is whether super-tax is within the words "duties of income tax" in s. 30 of the Customs and Inland Revenue Act, 1890. It is true that, with some few exceptions, income tax has always been an annual tax. For many years the Act imposing the tax was not passed till later than the beginning of the financial year, one exception being in the time of Pitt, when it was passed in a hurry in the previous December. As the tax was an annual one, the powers as to collection ceased with the expiration of the financial year on April 5, and from time to time methods were devised to remedy the inconvenience which resulted. There were three stages of these remedies. At first an Act was passed before the financial year had expired. Thus, in the Income Tax Assessment Act, 1870 (33 & 34 Vict. c. 4), which was passed in March of 1870, there was a recital that, in order to ensure the collection in due time of any duties of income

tax which might be granted for the ensuing financial year, it was expedient to apply the provisions of the Income Tax Acts as to assessment to such duties before the same were granted, and this was done. That was designed to keep the machinery going, although the tax was not yet payable. The same course was followed in 1871 (by 34 & 35 Vict. c. 5), and in 1872, and also in 1873 (by 36 & 37 Vict. c. 8). Then came the second stage. By s. 6 of the Customs and Inland Revenue Act, 1874 (37 & 38 Vict. c. 16), which imposed the tax for that year, the machinery was kept in operation as regarded the tax to be granted for the financial year beginning April 6, 1875. That is to say the machinery was put into the same Act, which fixed the duty for the current year and continued the machinery for the next year. The same course was followed until 1890. Then came the third stage. Super-tax will be found now in Part IV., relating to "Income Tax," as income tax is to be found in Part IV. of previous Acts.

In 1890 there was an enactment which is perpetual, and prevents a law officer from being obliged to demonstrate that such a provision is not a new instrument of oppression. Sect. 30 of the Act of 1890 is a provision firmly embedded in the statute-book until the happy time when income tax will be non-existent and forgotten, and is a provision relating to income tax. There is a provision in the Act of 1909-10 which enables you to use the machinery in use last year. What is available for income tax is available for super-tax.

That Act, the subsequent Act of 1910, and the Revenue Act of 1911, all shew that super-tax is income tax. What the plaintiff's counsel wants to treat as a new animal in the fiscal menagerie is labelled behind the bars as "Income Tax." Sect. 66 speaks of an additional duty of income tax, and therefore a duty of income tax within s. 30 of the Act of 1890. The sections from 66 to 71 all relate to income tax, and then s. 72 deals again with super-tax, which is treated as a member of the same family. [They also referred to the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5, and *In re Leveridge*. (1)]

Danckwerts, K.C., in reply.

Cur. adv. vult.

(1) [1901] 2 Ch. 830.

PARKER J.
1911
BOWLES
v.
ATTORNEY-GENERAL.

Dec. 12. PARKER J. This action raises, and has by consent been limited to, the question whether the Special Commissioners for the Purposes of Income Tax have power in the current financial year, which commenced on April 6, 1911, to demand returns for the purposes of assessments to the tax known as the "super-tax," notwithstanding that no such tax has yet been imposed for such year, and that it is therefore (theoretically at any rate) uncertain whether it will in fact be imposed.

With regard to ordinary income tax it is not disputed that the authorities responsible for its collection have this power, and that the persons from whom, under this power, returns are demanded are bound to make such returns, but it is contended that the statutory provisions which confer this power on the authorities responsible for the collection of income tax do not, according to their true construction, confer the like power on the Special Commissioners with regard to super-tax. In order to come to a conclusion whether this contention can be upheld, it is desirable to consider the history of the income tax as well as the precise terms of the statutory provisions in question.

It appears certain that the income tax was originally imposed as, and was intended to be, a temporary tax only, and the Acts regulating its collection have always been so drawn as to expire automatically (except as to arrears) at the end of the period of such imposition. If reimposed at the end of this period, the Acts were revived and continued by the Act reimposing the tax, but again only for the period of reimposition. The tax is still, as a matter of form, imposed as a temporary tax only, the period of imposition being for one year; but the hopes once entertained that it would be in fact temporary have long since vanished, and, though imposed only from year to year, it is in substance a permanent tax, and the officials responsible for its collection are in fact permanent officials.

The financial year in this country runs from April 6, but the exigencies of parliamentary business rarely permit of any Finance Act for the year being passed by that date. The Act imposing the taxes for each financial year is not, in general, passed till the summer months, and sometimes has to be postponed even further. This would naturally lead, and in fact did

lead, to considerable inconvenience, for all the powers of the officials responsible for the collection of income tax expired on April 5, being the expiration of the period for which the tax had been last imposed, and these officials could not, therefore, proceed with the preliminary work required for the collection of the tax, if it should be reimposed for the current year, until the Act reimposing it was actually passed. This was not at all conducive to the punctual collection of the tax. The Legislature, therefore, from time to time provided a remedy, and the different methods by which such remedy was from time to time provided may, perhaps, be taken as marking successive stages in the decay of the hopes originally entertained that the tax would be temporary only.

The first method of obviating the inconvenience in question was to pass an Act, shortly before the commencement of each financial year, applying the existing machinery for the collection of the tax to any duties of income tax which might be subsequently imposed for that year as if they had been already imposed. This was first done for the financial year commencing April 6, 1870, by the Income Tax Assessment Act, 1870, and continued to be so done for every financial year down to and including the year commencing April 6, 1874. The second method of obviating the inconvenience in question was to include in the Act imposing income tax for the current financial year a provision applying the existing machinery to any duties of income tax subsequently imposed for the next financial year in like manner as if they had already been imposed. This was first done for the year commencing April 6, 1875, by the Customs and Inland Revenue Act, 1874, and continued to be so done for every financial year up to and including the financial year commencing April 6, 1889. Thirdly and finally, the Customs and Inland Revenue Act, 1890, contains a general provision (s. 30) that, in order to ensure the collection in due time of any duties of income tax which may be granted for any year commencing April 6, all such provisions contained in any Act relating to income tax as were in force on the preceding day shall have full force and effect with respect to the duties of income tax which may be so granted in the same manner as if the said duties had been already

PARKER J. 1911 BOWLES v. ATTORNEY-GENERAL.

granted by Act of Parliament and the said provisions had been applied thereto by the Act.

It is noticeable that, notwithstanding this general clause, every subsequent Act imposing income tax has contained an express clause applying the provisions of all Acts in force on April 5 of the preceding year to the duties of income tax thereby granted, the object of the 30th section of the Act of 1890 being merely to bridge over the gap between the commencement of the current financial year and the actual imposition of the tax for that year, and to enable the work of the authorities responsible for the collection of the tax to be continued without any interval. It is under s. 30 of the Act of 1890 that the authorities responsible for the collection of income tax can demand returns for the current financial year before the Act imposing the tax for that year has actually passed.

The only question I have to decide in this action is whether this section applies not only to ordinary income tax, but to super-tax as well. In other words, I have to determine whether super-tax is a "duty of income tax" within the meaning of this section.

The super-tax was first imposed by the Finance (1909-10) Act, 1910. The section imposing it is one of a fasciculus of sections contained in Part IV. of the Act, which is headed "Income Tax," and by virtue of s. 96 is to be construed together with the Income Tax Acts, 1842 and 1853, and any other enactments relating to income tax, including, therefore, s. 30 of the Customs and Inland Revenue Act, 1890. The first of the sections contained in Part IV., namely, s. 65, imposes income tax for the financial year commencing April 6, 1909, at the rate of 1*s.* 2*d.* in the pound, and in the usual manner provides that all enactments relating to income tax in force on April 5, 1909, are to apply with respect to any duties of income tax thereby granted. Sect. 66 provides that, in addition to the income tax charged at the rate of 1*s.* 2*d.* under the Act, there shall be charged, levied, and paid, for the year commencing April 6, 1909, in respect of the income of any individual, the total of which from all sources exceeds 5000*l.*, an additional duty of income tax (in that Act referred to as a "super-tax") at the rate of 6*d.* in the pound for

every pound of the amount by which the total income exceeds 3000*l*. The rest of the section provides how this total income is to be calculated.

The super-tax, therefore, is an additional income tax imposed on individual incomes exceeding a specified amount. If the 65th and 66th sections had stood alone, a doubt might have been suggested whether the Legislature, though referring to the super-tax as an additional duty of income tax, is intending to apply the existing income tax machinery for the purpose of its collection and recovery. But this doubt is rendered immaterial by the express provisions of s. 72, which I will next consider, the intervening sections having nothing to do with the question at issue.

The 1st sub-section of s. 72 provides in effect that super-tax shall be assessed and charged by the Special Commissioners only, so that in this respect there is a difference between super-tax and ordinary income tax. The 2nd sub-section provides that every person on whom the Special Commissioners shall serve a notice as therein provided shall be bound to make a return of his total income within the time limited by the notice, and that, too, whether he is or is not actually chargeable with the super-tax. The 3rd sub-section provides that every person chargeable with the super-tax is bound to give the Special Commissioners notice that he is so chargeable before the 30th of September in the year for which the super-tax is chargeable, with a proviso that for the year commencing April 6, 1909, the notice is to be given before July 31, 1910.

This sub-section is important, for it shews conclusively that the Act is not intended to regulate the collection of super-tax for the year commencing April 6, 1909, only, but also its collection for subsequent financial years. In other words, it is being treated as a tax which is intended to be permanent though imposed only annually, just as ordinary income tax, though imposed annually, has in fact become a permanent tax. The 4th sub-section provides penalties for not making the returns or giving the notice required by the earlier sub-sections. The 5th sub-section enables the Special Commissioners to make assessments on persons who have failed to make the proper returns. The 6th sub-section applies to the super-tax all the provisions

PARKER J. 1911 BOWLES v. ATTORNEY-GENERAL.

of the Income Tax Acts relating to the persons chargeable with duty, assessment appeals, collection and recovery of duty, and cases for the opinion of the High Court, with divers other special provisions.

It is noticeable that the provisions of the Income Tax Acts relating to returns are not referred to in this sub-section, sub-s. 2 having already provided specially for the returns to be made. The 7th sub-section relates to amending assessments, and the 8th and last sub-section to regulations to be made by the Special Commissioners. Whether or not, therefore, if ss. 65 and 66 had stood alone, they could be construed as applying the existing income tax machinery to the additional duty of income tax called the super-tax, first imposed by s. 66, it is, I think, quite clear that s. 72 expressly provides appropriate machinery for its collection.

We have therefore the following facts. The super-tax is in fact an income tax. It is referred to in the Act which imposes it as an additional duty of income tax. It is collected and recovered by means (with some special and additional provisions) of the ordinary income tax machinery. It is intended, like the ordinary income tax, to be a permanent tax, though imposed annually only. It is imposed and its collection regulated by sections contained in a part of the Act which is entitled "Income Tax," and is to be read with all existing enactments relating to income tax, including s. 30 of the Customs and Inland Revenue Act, 1890. Under these circumstances can there be any real doubt that it is a duty of income tax within the meaning of the 30th section of the last-mentioned Act? In my opinion there cannot.

The effect, therefore, of this section is to give the Special Commissioners in any financial year commencing April 6, even although the super-tax has not been actually imposed for such year, all the powers of demanding the returns necessary for its assessment and collection in case it be so imposed which they had on the last day of the preceding year with regard to super-tax imposed for that year. Sect. 72 of the Finance (1909-10) Act, 1910, was by the Finance Act, 1910, applied to the super-tax thereby imposed for the financial year commencing April 6,

1910, and was in force on April 5, 1911. The Special Commissioners can, therefore, in my opinion, properly demand returns for super-tax for the financial year commencing April 6, 1911, before the super-tax be actually imposed for that year, and it follows that under the 72nd section the person who is served with the demand is bound to comply therewith.

In my opinion, therefore, the action fails and it must be dismissed, but it must not be understood that I am expressing any opinion as to how far the Special Commissioners have power, before the tax for any financial year is actually imposed, to go beyond the preliminary work such as the demand for returns necessary for its assessment. If, for example, they assess and demand payment of the super-tax before it be actually imposed, different considerations might and probably would arise.

Austen-Cartmell. My Lord, I think this is a case in which there are no costs. The Crown would not have to pay costs if it failed, and does not get costs if successful, so the judgment will simply be that the action is dismissed.

Solicitors for plaintiff: *Hasties.*
Solicitor for defendants: *Solicitor for Inland Revenue.*

F. E.

WARRINGTON J.
1911
Nov. 8, 9.

LAW GUARANTEE TRUST AND ACCIDENT SOCIETY *v.* MUNICH RE-INSURANCE COMPANY.

[1911 L. 458.]

Insurance (Guarantee)—Guarantee of Debenture Issue—Re-insurance of Risk—Liquidation of Guarantor Company—Scheme of Arrangement—Alteration of Risk—Liability of Re-insuring Company.

When a company guarantees the payment of the principal and interest on debentures and re-insures a proportion of the risk, the re-insurer is not released from liability for such proportion by reason of the guarantor company having entered into a scheme of arrangement with its creditors or gone into liquidation. In such a case there is no alteration of the risk, the contingency of such arrangement or liquidation being an element in the acceptance of the risk within the contemplation of the parties.

In 1903 the defendant company entered into a treaty of re-insurance with the plaintiff society under which it agreed to accept in re-insurance a certain proportion of the risks which the plaintiff company desired to re-insure arising (inter alia) under debenture guarantees issued or renewed by the plaintiff society. The treaty provided that the defendant company's liability should commence simultaneously with that of the plaintiff society and should follow it in every case, and that all settlements of claims in which the defendant company might be interested, whether by payment or otherwise, should be unconditionally binding on the defendant company. In 1904 the plaintiff society guaranteed an issue of debentures bearing interest at 4½ per cent. made by R. & Co. The debentures were secured by a trust deed which was in the usual form. By it the plaintiff society was appointed trustee for the debenture-holders, and the realization of the security on default of R. & Co. to pay principal and interest on the debentures thereby secured was left in the absolute and uncontrolled discretion of the plaintiff society, and it was thereby specially provided that that discretion was to be exercised not only for the benefit of the debenture-holders, but of the plaintiff society as guarantor of the debentures. The debentures provided that the interest should be payable half-yearly, and the principal on September 30, 1918, or if default was made for three months in payment of interest or an effective resolution was passed for winding up. Each debenture had indorsed on it a guarantee by which the plaintiff society guaranteed the payment (1.) of interest, if R. & Co. made default in payment thereof for thirty days, on demand, and (2.) of principal, if R. & Co. made default in payment thereof, on September 30, 1918, or on the day after the securities for the debenture-holders should have been enforced and completely realized and distributed. The plaintiff society under the treaty of 1903 re-insured two-thirteenths of

this risk with the defendant company. On December 13, 1909, the plaintiff society passed an extraordinary resolution to wind up, and on the following day the winding-up was ordered to be continued under the supervision of the Court, and in the liquidation a scheme of arrangement was sanctioned by the Court. The scheme provided (inter alia) that the interest on the debentures should be payable at 3 per cent. only till a fixed date; that the securities should be realized under the direction of the Court; and that the debenture-holders should be placed on the same footing as secured creditors of the plaintiff society with the rights of such creditors under the Bankruptcy Acts. On March 6 an order was made to wind up R. & Co. compulsorily; and on April 1 R. & Co. made default in payment of the interest on the debentures. The defendant company disclaimed liability for the risk re-insured on the ground that its character had been radically altered by the liquidation and scheme of arrangement:—

Held, that the risk insured was that of the default of R. & Co. to pay the principal and interest secured by the debentures, and not that arising from a deficiency of the security; that that risk had not been altered by the liquidation of the plaintiff society or the subsequent scheme of arrangement, and therefore the defendant company still remained liable to the plaintiff society as re-insurer for the proportion of the risk undertaken by it.

ACTION.

The Law Guarantee Trust and Accident Society (hereinafter called the plaintiff society) was a company registered under the Companies Acts, 1862 to 1886, and carried on in this country a business a considerable part of which consisted in the guaranteeing of mortgages and debentures, the insurance of licences, and the issuing of fidelity and contingency insurance policies.

The Munich Re-insurance Company (hereinafter called the defendant company) was an insurance company carrying on business in Germany and also in this country, and the principal part of its business consisted in the re-insurance of various risks, including risks on such matters as those above mentioned.

The plaintiff society in the course of its business entered into three several re-insurance treaties with the defendant company, dated respectively January 15, 1897, June 8, 1898, and July 22, 1903. Each successive re-insurance treaty superseded the previous one except so far as risks had been undertaken under the superseded treaty.

The material treaty in the present case was that of July 22, 1903. By article 2, "Subject to the stipulations hereinafter

WARRINGTON J.
1911
LAW GUARANTEE TRUST AND ACCIDENT SOCIETY v. MUNICH REINSURANCE COMPANY.

contained the " plaintiff society " agrees to re-insure with the " defendant company " and the " defendant company " agrees to accept in re-insurance 50 per cent. of the first excess (amounts exceeding its own retention) which the " plaintiff society " desires to re-insure arising " amongst other things " under all debenture guarantees issued or renewed by the " plaintiff society " through its London office or through any of its branches or agencies in the United Kingdom." By article 3 the liability of the defendant company " in respect of the share of such insurances as may be re-insured as aforesaid shall commence simultaneously with that of the " plaintiff society, provided that the plaintiff society should despatch the re-insurance advices to the defendant company at its London office within one month after receipt by the plaintiff society of advice of the issue of cover note policy or renewal receipt in respect of the same. By article 6, " The " defendant company " shall participate in its proper proportion in the same rates, risks and conditions set forth on the original policy re-insured." By article 7 the liability of the defendant company was to follow that of the plaintiff society in every case, and no error or omission in describing any risk notified to the defendant company by the plaintiff society was in any way to affect the defendant company's liability. By article 10 all settlements of claims in which the defendant company might be interested under the treaty made by or on behalf of the plaintiff society, whether by payment or otherwise, were to be unconditionally binding on the defendant company, which was also to be bound to pay its proportion of all costs, charges, and expenses (except ordinary administrative expenses) connected with any resistance to claims or to negotiations concerning and settlement of claims. The defendant company, however, was to be credited with its share of any reimbursement which might be made to the plaintiff society. By article 11, on receipt by the defendant company of a copy (certified as correct by the secretary of the plaintiff society) of any discharge for a claim arising out of a re-insurance risk given to the plaintiff society by its assured, the defendant company was to credit the plaintiff society with its share of such claim. In pursuance of this treaty a large number of risks were undertaken or re-insured by the defendant company.

In 1904 the plaintiff society guaranteed an issue of debentures to an aggregate nominal amount of 32,500*l.* made by a company called Remer & Co., Limited. The debentures were secured by a trust deed dated January 18, 1904, and made between Remer & Co. of the one part and the plaintiff society of the other part as trustee for the debenture-holders. By the deed, which was in the usual form, the plaintiff society was appointed trustee, and certain specific property was assigned to it, in addition to the creation of a floating charge in its favour on the company's other assets, present and future. The security was to become enforceable (amongst other things) if the company made default in the payment of any principal moneys or interest, or if an order should be made or an effective resolution passed for the winding up of the company. On the security becoming enforceable, the trustee, at the trustee's discretion, might enter on or take possession of all or any of the mortgaged premises, and sell and convert them into money, with full power to postpone any such realization at the trustee's discretion, unless otherwise requested by the debenture-holders of half the debentures, even in the case of wasting property, without being responsible for any loss occasioned by such postponement. The trust deed provided that the discretion given to the trustee to postpone the exercise of the primary trust for conversion was to be regarded as vested in the trustee not solely for the benefit of the debenture-holders, but also for the protection and benefit of the trustee as guarantor of the debentures; and that accordingly there was to be no right in the debenture-holders to interfere with the exercise of such discretion, or by application to the Court or otherwise to obtain any order or direction in effect controlling or interfering with the exercise of such discretion. The deed provided for the establishment of a sinking fund for the redemption of the debentures. The statutory power of appointing new trustees was to be vested in the company. General meetings of the debenture-holders were to have power (amongst other things) by extraordinary resolutions passed with the previous consent in writing of the plaintiff society, if and whilst guarantor of the debentures, to sanction the surrender or release of any of the mortgaged premises, and to sanction any compromise or arrangement proposed to be made

WARRINGTON J.
1911
LAW GUARANTEE TRUST AND ACCIDENT SOCIETY v. MUNICH REINSURANCE COMPANY.

between the company and the debenture-holders, provided it was one which the Court would have jurisdiction to sanction under the Joint Stock Companies Arrangement Act, 1870, or any statutory modification or re-enactment thereof for the time being subsisting if the company were being wound up and the requisite majority, at a meeting of the debenture-holders summoned pursuant to that Act or modification or re-enactment, had agreed thereto; and also power to assent to any modification of the provisions of the trust deed proposed by the company and assented to by the trustee.

The debentures, which were for a sum of 100*l.* each with interest at 4½ per cent. per annum, provided that they were to be payable on September 30, 1918, or such earlier day as the principal moneys thereby secured became payable in accordance with the conditions indorsed thereon, and they constituted a charge on the undertaking and all the present property of the company. The conditions provided that the principal moneys should become payable if the company made default for three calendar months in the payment of any interest, or if an order was made or an effective resolution passed for the winding up of the company, or as soon as the security constituted by the trust deed should have become enforceable and the trustee should have determined or become bound to enforce it. Each debenture had indorsed upon it the guarantee of the plaintiff society, which was in these terms: The plaintiff society "acknowledges that the above debenture was subscribed for on condition and in part consideration that the society would give the guarantee following and accordingly the society hereby guarantees to the registered holder of the above debenture . . . . the payment of the principal moneys and interest to become due under the said debenture in manner following, that is to say:—(1.) As to interest. If and whenever the company makes default in the payment of any interest for more than thirty days the society will pay such interest on demand. (2.) As to principal. If the company makes default in the payment of the principal moneys or any part thereof the society will pay the amount upon whichever of the days following shall first happen, namely (*a*) on the 30th day of September, 1918, above mentioned"—the date on which the debentures

matured—"or (*b*) on the day after the securities for the debenture-holders of the series to which the above debenture belongs shall have been enforced and completely realized and distributed as far as regards the holder of the above debenture. (3.) At any time after the company shall have made default for more than fourteen days in the payment of any principal moneys or interest the society may" call upon the debenture-holder to transfer his security to the plaintiff society. "(4.) If the company makes default for more than thirty days in the payment of any principal moneys or interest secured by the above debenture the debenture-holder must give notice in writing of such default to the society as to interest within six calendar months after the default and as to principal within twelve calendar months after the default."

On March 9, 1904, the plaintiff society's risk in connection with the guarantee of the debentures was re-insured with the defendant society pursuant to the treaty of July 22, 1903, to the extent of two-thirteenths of the risk, and a notification of such re-insurance was duly forwarded to the defendant company, and the defendant company was paid or credited with its proper proportion of the first premium payable on such re-insurance and also its proper proportion of all subsequent premiums paid by Remer & Co.

On December 13, 1909, an extraordinary resolution was passed for the winding up of the plaintiff society, and by an order dated December 14, 1909, the voluntary winding-up was ordered to be continued subject to the supervision of the Court.

By an order dated July 28, 1910, a scheme of arrangement between the plaintiff society and certain classes of its creditors under s. 120 of the Companies (Consolidation) Act, 1908, was sanctioned by the Court. Under this scheme (clause 9) secured creditors (including holders of debentures guaranteed by the plaintiff society), if their security was realized before September 30, 1918, were to be entitled, after complying with the terms and conditions of their policies (if any), and of the scheme, to prove for the balance due to them after deducting the net amount realized. If a secured creditor surrendered his security to the liquidators, or as they might direct, he might prove for

WARRINGTON J.
1911
LAW GUARANTEE TRUST AND ACCIDENT SOCIETY v. MUNICH REINSURANCE COMPANY.

the full amount of his claim. If he neither realized nor surrendered his security he was to assess its value in his proof, and was to be entitled to prove for the balance only of his claim after deducting the value so assessed. Where a security was valued the liquidators might at any time within three months take it over on payment to the creditor of the assessed value, or require the property comprised in it to be offered for sale. Secured creditors were to be at liberty at any time to value their securities, and on the value being admitted they were to be entitled to deal with the securities without the liquidators' consent, as they might think fit and for their own benefit, being thenceforth treated as creditors only in respect of the balance of their claims. No valuation was to be withdrawn or amended without the consent of the liquidators or the leave of the Court. Any secured creditor wilfully refusing to comply with these terms was to be excluded from all share in any dividends in the liquidation. By clause 12 special provisions were made as to holders of debentures guaranteed by the plaintiff society. Under that clause the liquidators in all cases of default in payment in full of interest on the debentures of any company down to December 31, 1918, were to pay or make up such interest to 3 per cent. per annum on the principal moneys secured by the debentures. The plaintiff society, in any case where it should have taken possession or should be or become entitled to take possession of the property and assets comprised in any trust deed, was to be at liberty (subject always to the order of the Court in any action to enforce the security comprised in the trust deed or debentures, or in the liquidation of the plaintiff society), until it should have been released or the security valued, to continue in possession by the liquidators, or a receiver. But except under the provisions of clause 9 the liquidators, notwithstanding the powers contained in any trust deed, were not (except with the leave or by the direction of the Court) to realize or to enforce the realization of the property and assets comprised in any trust deed or secured by debentures at a less sum than was sufficient to pay the debenture-holders the principal moneys due to them and interest at 3 per cent. per annum, unless the debenture-holders' committee (which the debenture-holders of

each separate company were to be at liberty to appoint and maintain) consented to the sale or the liquidators agreed to provide out of the assets of the plaintiff society within three months after the sale the balance, if any, remaining due to the debenture-holders for principal and interest at 3 per cent. This, however, the liquidators were not to agree to do without the consent of the creditors' committee of inspection or the sanction of the Court, except in the case of a company whose debenture-holders failed to appoint a committee. By clause 13 any secured creditor who did not make any claim against the assets of the plaintiff society was to be entitled to realize or deal with his security for his own benefit as he might think fit. By clause 19 the liquidators were, prior to December 31, 1918, to realize all assets of the plaintiff society and on that date to apply them in the order following: In payment of all sums (other than arrears of interest) then remaining payable in respect of salaries, wages, and office rent and expenses, costs and expenses of liquidation, and sums payable to keep up policies of assurance or to keep re-insurances on foot; in payment pari passu of all arrears of interest on the principal moneys due at 3 per cent. and payable under (among others) clauses 9 and 12; in payment pari passu of the claims for principal moneys proved and admitted by the liquidators or adjudicated; and in payment pari passu of arrears of interest payable by virtue of any written instrument at rates above 3 per cent. The surplus, if any, was to be divided among the contributories. By clause 22 the liquidators were to have power to enter into and carry into effect any compromise or arrangement with any creditors or any committee of debenture-holders, with the consent of the committee of inspection or the sanction of the Court. By clause 23 the liquidators were to be at liberty to deal with all re-insurers of risks undertaken by the plaintiff society by offering them an option to have their liabilities in respect of re-insurance estimated as if the scheme had not become binding and the assured had proved for the contingent liabilities of the plaintiff society pursuant to s. 206 of the Companies (Consolidation) Act, 1908, on or before December 31, 1910, or to be bound by the scheme in all respects, and accordingly to have

WARRINGTON J.
1911
LAW GUARANTEE TRUST AND ACCIDENT SOCIETY v. MUNICH REINSURANCE COMPANY.

their liabilities in respect of re-insurances ascertained on the footing of the claims of the assured made and allowed under the scheme being treated as the amount payable under the policies re-insured. By clause 25 such alterations were to be made in the scheme as the Court might approve or impose.

On January 31, 1911, the plaintiff society under its powers contained in Remer & Co.'s trust deed appointed a receiver on behalf of the debenture-holders.

On March 6, 1911, an order was made for the compulsory winding up of Remer & Co. On April 1, 1911, default was made by Remer & Co. in the payment of interest and in respect of the debentures.

The defendant company by letters dated December 1, 1910, and January 9, 1911, repudiated all its obligations in respect of risks re-insured by it pursuant to the treaties or any of them which at the date of the liquidation of the plaintiff society had not become claims.

On February 25, 1911, the plaintiff society commenced the present action, claiming (1.) a declaration that, notwithstanding the liquidation of the plaintiff society by means of or under the scheme of arrangement, the defendant company remained and still were liable to the plaintiff society as re-insurer of two-thirteenths of the risk undertaken by the plaintiff society in respect of the guarantee by them of the debentures issued by Remer & Co., and (2.) a declaration that the defendant company was not by reason only of the liquidation of the plaintiff society released from any risk re-insured by it pursuant to the re-insurance treaties or any of them.

The defendant company by its defence contended that its liability for the risks re-insured by it in respect of the debentures issued by Remer & Co. expired on December 13, 1909, when the plaintiff society ceased to carry on its business and its assured became creditors in the liquidation in respect of non-expired risks. Alternatively the defendant company contended that, if under the scheme of arrangement the plaintiff society remained liable in respect of the risks in connection with the guarantee of the debentures, the character of such risks was so altered by reason of the liquidation under the provisions of the

scheme of arrangement that the defendant company was entitled to be released from such risks.

Buckmaster, K.C., Clauson, K.C., and *F. H. Maugham*, for the plaintiff society. The risk insured by the plaintiff society was the risk of the default of Remer & Co. to pay the principal moneys and interest secured by the debentures: *Finlay* v. *Mexican Investment Corporation.* (1) That risk was re-insured by the plaintiff society with the defendant company. The contract between the re-insurer and the insurer is entirely distinct from the contract between the insurer and the assured. The liquidation, therefore, of the plaintiff society did not terminate the risk. Further a scheme of arrangement sanctioned by the Court is an alternative mode of liquidation: *In re London Chartered Bank of Australia.* (2) Inasmuch, therefore, as the liquidation of the plaintiff society did not operate to release the defendant company from its risk, neither did the scheme of arrangement: *Dane* v. *Mortgage Insurance Corporation* (3); and compare *Shaw* v. *Royce, Ld.* (4) The defendant company is not entitled to interfere with an arrangement between the plaintiff society and its creditors: *Western Assurance Co. of Toronto* v. *Poole.* (5) Such an arrangement cannot affect the contract between the plaintiff society and the defendant company. It is true that if an assured who has sustained a loss in respect of which he has a claim against some third party comes to any arrangement with such third party which prejudices the insurer's rights of subrogation he will be bound to give credit to the insurer for the value of such rights: Arnould on Marine Insurance, 8th ed. p. 1492. Even assuming that the plaintiff society has voluntarily entered into this scheme of arrangement the original risk has not been thereby altered, though the plaintiff society may possibly have put itself in such a position that it may not get as much salvage out of the debenture-holders' security. That, however, is only a question of quantum.

Upjohn, K.C., Cave, K.C., and *F. G. Thomas*, for the defendant

(1) 1897] 1 Q. B. 517.
(2) [1893] 3 Ch. 540.
(3) [1894] 1 Q. B. 54.
(4) [1911] 1 Ch. 138.
(5) [1903] 1 K. B. 376, 385.

WARRINGTON J.
1911
LAW GUARANTEE TRUST AND ACCIDENT SOCIETY v. MUNICH REINSURANCE COMPANY.

company. It is common ground between us that a contract of re-insurance is quite distinct from the original contract of insurance and is itself a contract of insurance. If the assured under a contract of insurance does anything whereby he alters the risk insured against he thereby determines the contract. That is what the plaintiff society has done in the present case. Under the scheme of arrangement a totally different position has been produced to that which existed at the time the contract of re-insurance was entered into. By the scheme the amount of the interest on the debentures has been reduced, the payment of the principal postponed, and the realization of the security, instead of being in the absolute and uncontrolled discretion of the plaintiff society as trustee of the trust deed, is now subject to the control of the Court. The original risk has therefore been altered and it is not necessary for the defendant company to shew that that was done with the consent of the plaintiff society. A contract of re-insurance is not one of indemnity—*Nelson* v. *Empress Assurance Corporation* (1)—and accordingly in a case of re-insurance it is vital to a plaintiff to shew that he is at a risk under the original policy of assurance: *Colonial Insurance Co. of New Zealand* v. *Adelaide Marine Insurance Co.* (2) What the plaintiff society insured with the defendant company was two-thirteenths of the risk of a deficiency on the realization by the plaintiff society of the debenture-holders' security. That risk has been altered by the scheme, and there cannot now be a loss in respect of the old risk. The defendant company is under no liability to pay unless the plaintiff society is liable to pay in respect of the original risk, and that it has ceased to be by the operation of the scheme. In effect the plaintiff society is trying to impose a new contract and a different risk on the defendant company. [They also referred to *In re Eddystone Marine Insurance Co.* (3); Arnould on Marine Insurance, 8th ed. pp. 420, 496; and Porter's Laws of Insurance, 5th ed. p. 293.]

Buckmaster, K.C., in reply. The office of trustee of the trust deed held by the plaintiff society was not and could not have

(1) [1905] 2 K. B. 281. (2) (1886) 12 App. Cas. 128.
(3) [1892] 2 Ch. 423.

been intended by the parties to be a permanent office. That is shewn by the power in the deed to appoint new trustees. The defendant company cannot therefore rely on the personal protection of the plaintiff society due to its holding the office. Further under the treaty of July 22, 1903, the defendant company had no power to refuse to accept any risks offered to it by the plaintiff society. By the trust deed the realization of the property was left in the hands of the plaintiff society to do exactly what it thought best having regard to all the circumstances of the case. Everything that the scheme does as between the plaintiff society and its creditors could have been done by the plaintiff society itself with the debenture-holders and no objection could have been raised by the defendant company. The scheme does nothing except provide for the way in which the risk is to be met: it has not altered the risk. That risk was that Remer & Co. would not pay and had nothing to do with the realization of the security. There is nothing to prevent a trustee invested with an absolute discretion as to the management of trust property from at any time applying to the Court for directions as to how that discretion is to be exercised. That is what in effect the plaintiff society has done.

WARRINGTON J. The plaintiff society has insured the debentures of Remer & Co., Limited. In pursuance of a contract between the plaintiff society and the defendant company, the defendant company has insured the plaintiff society a part of the risk it has undertaken. The plaintiff society is now in liquidation, and, in the course of that liquidation, a scheme has been sanctioned by the Court for dealing with the various claims against the plaintiff society. The defendant company, the re-insurer, alleges that the result of the liquidation of the plaintiff society and the arrangements made in that liquidation has been to discharge it from liability under its contract of re-insurance, and the only question I have to determine is whether that contention is correct. I have nothing to do with the amount for which the defendant company may be liable in case it should be held that it is liable at all.

The facts are not in dispute. The plaintiff society undertook,

WARRINGTON J.
1911
LAW GUARANTEE TRUST AND ACCIDENT SOCIETY v. MUNICH REINSURANCE COMPANY.

amongst other classes of business, the insurance of debentures issued by companies, and it was an element in the conduct of that business that it obtained re-insurances from other parties to protect itself. As I have already said, one of the parties with whom it entered into those treaties of re-insurance was the defendant company. The current treaty—the one which is alone material in the present case—is dated July 22, 1903. [His Lordship referred to articles 2, 3, 6, 7 and 10 of the treaty, and continued:] There is nothing further in that treaty to which for the present purposes it is necessary to refer. There is one point of importance, and that is this—that the defendant company binds itself to re-insure its proportion of all insurances or guarantees entered into by the plaintiff society of the classes described. It is not left open to the defendant company to accept or refuse the particular risk tendered to it.

Subsequently, on January 18, 1904, a trust deed was executed in reference to certain debentures issued by Remer & Co. This company proposed to issue debentures to the amount of 32,500*l*. The form of those debentures is contained in a schedule to the trust deed. I shall have more to say about the trust deed directly, but the first matter of importance is the debentures. Each of these debentures was for a sum of 100*l*. with interest at 4½ per cent. per annum, and it provided that Remer & Co. would "on the 30th day of September, 1918, or on such earlier day as the principal moneys hereby secured become payable in accordance with the conditions indorsed hereon pay to of or other the registered holder for the time being hereof the sum of 100*l*.," and also pay interest at 4½ per cent., as I have already mentioned, "by half-yearly payments on the first day of April and first day of October in each year." Pausing there for one moment, the obligation, therefore, of Remer & Co. is to pay the principal money on September 30, 1918, or on an earlier day if certain events happen, and to pay the interest by half-yearly payments on the days named. Then, of course, there is the usual charge on the undertaking of Remer & Co. and all its property. The conditions indorsed on the debentures provide, amongst other things, that the principal moneys shall become due if an order is made or an effective resolution is passed for the winding up of

the company. That is one of the events on which the money becomes payable, and another is that the money shall become payable as soon as the security constituted by the trust deed shall have become enforceable, "and the trustee of such indenture shall have determined or become bound to enforce such security and shall by notice in writing to the company have declared that on behalf of the debenture-holders the trustee calls for payment off of the outstanding debentures of the said series." That is the debenture which is guaranteed. The trust deed secures the payment of that series of debentures. It is in the usual form, containing an assignment to the plaintiff society, which is the first trustee of it, of certain specific property and a general charge on the undertaking and other assets of Remer & Co. What is material for the present purposes is that the realization of the property, the subject of the security, is left in the absolute and uncontrolled discretion of the trustee, a discretion which, by a special provision in a schedule to the trust deed, is to be exercised or is intended to be exercised for the benefit not only of the debenture-holders but of the plaintiff society itself, the trustee, as the guarantor of those debentures. I need not go into the details of it: it is sufficient to say that the point which is material in the present case is that the realization of the assets is by the trust deed left in the absolute and uncontrolled discretion of the trustee. The deed contains, amongst other things, a provision for the appointment of a new trustee; and the fifth schedule to the deed contains provisions which in one aspect of the case are of great importance—provisions enabling a meeting of debenture-holders to (amongst other things) sanction the surrender or release of any of the mortgaged premises, and to sanction any compromise or arrangement proposed to be made between Remer & Co. and the debenture-holders if it is one that the Court might sanction under the Joint Stock Companies Arrangement Act, 1870, or any statutory modification of it. The debenture so secured was that which was guaranteed by the plaintiff society.

I now come to the form of guarantee, which is indorsed on each debenture. It is in these terms: [His Lordship read clauses 1 and 2 of the guarantee above set forth, and continued:]

WARRINGTON J.

1911

LAW GUARANTEE TRUST AND ACCIDENT SOCIETY v. MUNICH REINSURANCE COMPANY.

Then there is a provision intended for the benefit or protection of the plaintiff society, which it is immaterial for me to read for the purposes of the present case; but the point is that the plaintiff society guarantees the payment of the principal moneys and interest secured by the debenture in certain events, first with regard to interest and secondly with regard to principal in each case, if Remer & Co. shall make default.

Now, having accepted that risk, the plaintiff society put the defendant company upon it in respect of two-thirteenths of the entire risk, and it did that by sending to the defendant company a slip which contained the necessary particulars of that risk. The slip stated that the risk insured was that of debentures; it gave the description of the property, the name and address of Remer & Co., the mortgagees being various, because, of course, they were debenture-holders; then the conditions and description of the risk: "Guarantee of Debentures—see particulars herewith"; and the rest is immaterial, being merely further particulars as to date, amount, premium, and so forth. The "particulars herewith" were contained in what was in fact the plaintiff society's prospectus sent to certain probable investors, and it referred to the trust deed; but, in my view of the case, the fact that the existence of that trust deed was communicated to the defendant company is really immaterial, because, as I have already pointed out, under the treaty the defendant company had no option to accept or refuse the risk tendered to it. The statement, therefore, in the particulars contained in that prospectus is nothing more than additional information to that contained in the slip as to what was the nature of the particular risk which the defendant company was asked to re-insure. That being the state of things, the premiums were paid regularly, and so forth, and matters went on until December 13, 1909, when the plaintiff society was wound up by the passing of an extraordinary resolution under the Companies (Consolidation) Act, 1908. On December 14 the winding-up was continued under the supervision of the Court, and on July 28, 1910, a scheme of arrangement was sanctioned under the provisions of the Act of 1908, an arrangement between the plaintiff society and certain classes of its creditors, and it is on the provisions of that scheme that a

great deal of the argument addressed to me has turned. I need not go through the details of it; it is quite sufficient to state what the effect of it is from the point of view of the defendant company. The effect as regards the position between the plaintiff society and the debenture-holders was, first, that the interest secured by the debentures was payable at the rate of 3 per cent. only until the end of 1918; on the expiration of that period the back interest was to become payable. With regard to the securities for the debentures, provisions were made for the realization of the securities in the events which have happened in the case of this particular company under the direction of the Court, and provisions were further made by which the debenture-holders were placed on the same footing as if they had been secured creditors of the plaintiff society in liquidation, with power either to take their securities at a valuation and prove for the balance or realize their securities and then prove for the balance; I mean such provisions as those contained in the Bankruptcy Act, 1883, with reference to secured creditors in a bankruptcy. That is the general nature of the scheme so far as it is material for the present case. On January 31, 1911, the plaintiff society under the provisions of their trust deed appointed a receiver of the property and undertaking of Remer & Co., and on March 6, 1911, Remer & Co. went into liquidation. On that date, if not on January 31, but on March 6, 1911, at all events, the principal moneys secured by the debentures became payable under the conditions to which I have already referred. On April 1, being the first half-yearly day for payment of interest after the liquidation of Remer & Co., that company made default in payment of interest. The default, therefore, of Remer & Co. has happened first with regard to principal, on the liquidation of that company, and with regard to interest on April 1, 1911. These are all the important facts.

The defendant company says that the result of those facts is that it has been released from its contract of insurance. By contract of insurance I mean, of course, contract of re-insurance, but it is convenient to treat it, as it in fact is, as a contract between the defendant company and the plaintiff society for the insurance of the plaintiff society. The defendant company rests its case upon the general principle applicable in all cases of

WARRINGTON J.
1911
LAW GUARANTEE TRUST AND ACCIDENT SOCIETY v. MUNICH REINSURANCE COMPANY.

insurance that the obligation of the insurer is confined to the particular risk insured, and that if the risk in respect of which a claim is made against the insurer differs from the risk he has insured, he is not liable to make good that claim. That, of course, is an undoubted principle of the law of insurance, and the only question is whether it applies to the facts in the present case; whether there has been such an alteration of the risk as to relieve the insurer from meeting a claim arising under it.

It is hardly necessary to enlarge upon that principle, but I take it that it involves this. The alteration, if there has been an alteration, must be a real alteration of the risk; if what appears on the face of it to be an alteration of the conditions is only such an alteration as, on the true construction of the contract of insurance, might be taken to have been within the contemplation of the parties at the time they entered into the contract, then, of course, though apparently an alteration, it is no real alteration at all, because the fact that such an alteration might take place was an element in the contract itself. I have, therefore, to determine whether there has, in the present case, been an alteration of the risk sufficient to relieve the insurer.

Now, obviously, before one can ascertain whether there has been an alteration in the risk, one must ascertain what is the risk itself. The plaintiff society says the risk is the default of Remer & Co. in paying principal or interest under the debentures. The defendant company says the risk is not so simple; it says that the risk is not merely the default on the part of Remer & Co., but the deficiency in the security—that what the plaintiff society undertook to do was to make up to the debenture-holders any deficiency in the ultimate realization of the security, and that in that view the mode of the realization and the circumstances in which the property was to be realized are essential elements in the risk. Now which of those two views of the meaning of this contract of insurance is the correct one? In my opinion that put forward by the plaintiff society. I think when one looks at the form of the guarantee, which for this purpose is the only document that is really material, it is plain that the realization of the security was merely an element in ascertaining the actual amount which might ultimately have to be paid by the plaintiff

society, but that, quite irrespective of that realization, the plaintiff society undertook, in case default should be made by Remer & Co., to pay the principal money and interest secured by the debentures. I really hardly like to go back again to the terms of the guarantee, but I will just read again a few words to illustrate what I mean. In the first place, the plaintiff society in terms guarantees the payment of the principal moneys and interest due under the debentures. That is the whole of it. The payment—but it is the payment only—is to be in manner following, and then come those provisions relating first to interest and secondly to principal, and with regard to interest the manner in which it is to be paid is on demand, that is all; it merely provides that the payment is to be made whenever the company makes default. That is the event on which the liability arises; the manner of payment specified in the guarantee is on demand. With regard to the principal, the liability to make the payment arises in this case also in case of default. It is in case the company makes default in payment of the principal moneys and interest or any part thereof. That is when the liability arises. The manner in which that payment is to be made is specified again, as in the case of interest, by fixing the days on which the payment is to be made; the day being the day on which the debentures expire—September 30, 1918, in case they run so long, or in case they do not, and the property is realized and distributed, then the day after that realization and distribution takes place. But the essence of the contract is that the plaintiff society will make the payment; the manner in which the payment is to be made is mere detail of arrangement as to time and mode, but the essence of it is that the liability of the plaintiff society arises on default by Remer & Co. I think that is the true view of the contract.

Now, if that is the true view of the contract, then Remer & Co. have made default. The risk has become a claim; the liquidation of the assured, the plaintiff society, is for this purpose quite immaterial, for the sole event upon which the liability of the insurer arises has happened, and there has been nothing to prevent that from arising.

But I think it is desirable to see how the matter stands on the

WARRINGTON J.
1911
LAW GUARANTEE TRUST AND ACCIDENT SOCIETY v. MUNICH REINSURANCE COMPANY.

other aspect of the case. Supposing the risk is that which the defendant company says it is: has there even then been such an alteration as would be sufficient to relieve it from liability under its policy? What the defendant company says is that the risk it undertook, in this aspect of it, was a risk of making good such a deficiency as there might be in the security after the realization thereof by a particular person—the plaintiff society, as trustee of the trust deed—and at the discretion of that person, and that the realization which will take place under the liquidation and the subsequent scheme of arrangement is not a realization of that character. Now is that contention well founded? The trust deed, it is quite true, provides for the realization of the security at the discretion of the trustee, and I will assume for the moment—though it is a large assumption to make—that it was in the contemplation of the parties that the plaintiff society would always remain the trustee. Even then, what has happened to affect the realization, having regard to the provisions of the trust deed and in particular to the provisions which relate to the arrangements between the debenture-holders and Remer & Co.? In the first place, in the events which have happened with regard to this particular company, all that has happened as to realization is that the plaintiff society, being in liquidation, has bound itself by the terms of the scheme of arrangement to realize the property under the direction of the Court. Now did any one ever hear of a trustee invested with such a discretion that he could not exercise it in such manner as he pleases, namely, if he thinks fit, by obtaining the direction of the Court as to the particular mode in which he shall exercise it? I never heard of such a thing. It is everyday practice in the administration of trusts for a trustee with an absolute discretion to come to the Court and say "I do not know how best to do this; I ask the Court to help me, and I ask that it may give me directions as to how I shall do it." But the trustee is exercising his discretion in asking for such directions; and so in this case, the plaintiff society in submitting to the scheme (in fact I think it applied for it, but that does not matter) under the liquidation is exercising its discretion in the mode in which it seems to the plaintiff society best to exercise it. Then with regard to the

position of the debenture-holders, who for some purposes or in certain events are entitled to take the security themselves and realize it, the provisions with reference to the meetings of debenture-holders and to arrangements which the debenture-holders can make are, in the view put forward by the defendant company, elements in the risk which it undertook, and these arrangements binding the debenture-holders in reference to the valuing or realization of the securities are arrangements which might well have been made under those provisions. That being so, there is, in my opinion, no alteration of the risk undertaken by the defendant company even if that risk be interpreted in the way in which the defendant company would have it interpreted.

The result, therefore, in my opinion, is that nothing has happened to relieve the defendant company from its liability under its contract of insurance, and that some form of declaration such as that asked for by the plaintiff society must accordingly be made. It appears to me that the best form of declaration would be a declaration in the terms of paragraph 1 of the prayer in the statement of claim. I do not see my way to make a general declaration. The declaration made on these pleadings, though not technically binding, will, of course, be a precedent which will probably be followed in other cases covered by it.

Solicitors: *Torr & Co.; Paines, Blyth & Huxtable.*

W. I. C.

C. A.
1911
Nov. 7, 17.

DYSON *v.* ATTORNEY-GENERAL.

[1910 D. 834.]

Revenue—Valuation of Land—Form 4—Owner who is also Occupier—Return to be made to Appointed Officer—Less than Statutory Limit of Time for making Return allowed — Requisition that Owner who is also Occupier should state Annual Value—Ultra vires—Relief against Crown—Declaratory Judgment—Rules of the Supreme Court, 1883, *Order* XXV., *r.* 5; *Order* LXVIII., *r.* 1—*Finance* (1909-1910) *Act,* 1910 (10 *Edw.* 7, *c.* 8), *s.* 26.

On August 9, 1910, the plaintiff, who was the owner of land in Yorkshire, received a notice, dated August 4, signed by the secretary to the Commissioners of Inland Revenue, requiring him to make returns of his property upon forms which accompanied the notice and deliver them "within thirty days from this date to the appointed officer H. B." The notice also pointed out that failure to make a return within the specified time would entail a penalty not exceeding 50*l.* With the notice were sent six copies of Form 4, issued under the Finance (1909-1910) Act, 1910, five of which related to premises belonging to the plaintiff and let to tenants, and one to property owned and occupied by him. The forms asked for "Particulars required by the Commissioners which must be furnished so far as it is in the power of the person making the return to give them . . . . (*i*) If the person making the return is also the occupier state the annual value; that is the sum for which the property is worth to be let to a yearly tenant, the owner keeping it in repair":—

Held, affirming the decision of Horridge J., that the direction to make the return to H. B. instead of to the Commissioners did not invalidate the notice; that requisition (*i*) was unauthorized and, therefore, that the whole of the Form 4 addressed to the plaintiff as owner and occupier was invalid; that inasmuch as the statutory period of thirty days provided by s. 26, sub-s. 2, of the Finance (1909-1910) Act, 1910, as the period within which to make his return, had not been allowed to the plaintiff, he was under no obligation to comply with the requisitions in any of the forms; and (following their Lordships' previous decision in *Dyson* v. *Attorney-General* [1911] 1 K. B. 410) that the Court had jurisdiction to make a declaratory order against the Attorney-General as representing the Crown.

Appeal from a decision of Horridge J.

The plaintiff was the owner of property consisting of (*a*) a house and premises together with gardens, orchards, and agricultural land to the extent of about thirty acres attached thereto, and also (*b*) agricultural land to the extent of about forty acres upon which were a farmhouse, buildings, and cottages.

On August 9, 1910, there was left at his premises a notice dated August 4, addressed to the plaintiff and signed by the secretary to the Commissioners of Inland Revenue. This notice was headed "Duties on Land Values. Notice to make returns"; it referred to the provisions of the Finance (1909–1910) Act, 1910, and required the plaintiff to make returns in respect of the above-mentioned property upon forms which accompanied the notice and to deliver the returns duly signed by him "within thirty days from this date to the appointed officer Hugh Bateson, Kirkby Overblow." The notice also pointed out that failure to make a return within the specified time would entail a penalty not exceeding 50*l*. With the notice were sent "instructions for making returns on Form 4" and six copies of Form 4 relating to the plaintiff's property. Five of these forms referred to premises let to tenants and one to property in his own occupation. These forms were issued by the Commissioners of Inland Revenue under the Finance (1909–1910) Act, 1910, with a view to the collection of duties on land. Form 4 was headed "Unofficial. Duties on land values. Finance (1909–1910) Act, 1910. Return to be made by an owner of land or by any person receiving rent in respect of land. (Penalty for failure to make a due return, not exceeding 50*l*.)" The form then called attention to the accompanying instructions, and gave a short description of the property in question extracted from the rate-books, and continued: "Important. As the land is to be valued as on 30th April, 1909, the particulars should be furnished so far as possible with reference to the circumstances existing on that date. 1. Particulars required by the Commissioners which must be furnished so far as it is in the power of the person making the return to give them (*a*) parish or parishes in which the land is situated; (*b*) name of occupier"; (*c*) name and address of person making return; (*d*) nature of his interest; (*e*) name and situation of the land; (*f*) description of the land and buildings; (*g*) extent of the land if known; (*h*) terms on which the land is let. "(*i*) If the person making the return is also the occupier state the annual value; that is the sum for which the property is worth to be let to a yearly tenant, the owner keeping it in repair," &c., &c. The following statement was

C. A. 1911 DYSON v. ATTORNEY-GENERAL.

to be signed by the person making the return: "I hereby declare that the foregoing particulars are in every respect fully and truly stated to the best of my judgment and belief. Dated this day of 191 ."

On November 7, 1910, a reminder was sent by Mr. Atterbury to the plaintiff requesting him to make the return to Hugh Bateson and calling his attention to the penalty.

The plaintiff brought this action against the Attorney-General for a declaration that he was under no obligation to comply with the notice of August 4, 1910, or to furnish any particulars to Hugh Bateson or at all; that he was entitled to furnish any returns which might lawfully be required to the Commissioners of Inland Revenue and not to Hugh Bateson; and that he was not under any obligation to comply with requisition (*i*). He alleged that Hugh Bateson was a blacksmith living in a neighbouring village.

On an application to strike out the statement of claim as disclosing no reasonable cause of action the Court of Appeal held that a declaratory judgment could be made against the Attorney-General as representing the Crown and that the action ought to proceed. The case is reported [1911] 1 K. B. 410.

The action came on for trial before Horridge J. on October 23, 1911, when it appeared that several of the points in dispute had formed the subject of a decision by Warrington J. in *Burghes* v. *Attorney-General* (1) and that that case was under appeal. Horridge J. therefore did not give a reasoned judgment, but made an order that the notice and the returns required to be made were unauthorized, and that the plaintiff was not under any obligation to comply with them.

The Attorney-General appealed, and the appeal now came on for hearing immediately after that in *Burghes* v. *Attorney-General.* (2)

Sir Rufus D. Isaacs, A.-G., Sir J. A. Simon, S.-G., S. A. T. Rowlatt, and *Austen-Cartmell,* for the appellant. It is said that these forms are unauthorized and therefore illegal on three grounds: first, because the statutory period of thirty days fixed by

(1) [1911] 2 Ch. 139. (2) Post, p. 173.

s. 26, sub-s. 2, of the Finance (1909-1910) Act, 1910 (1), as the period within which to make the returns was not allowed to the plaintiff; secondly, because the notice stated that returns must be made to Hugh Bateson and did not state that they might be made to the Commissioners; and thirdly, because the plaintiff was asked by requisition (*i*) to give an estimate of the annual value of land of which he was occupier as well as owner. The first and second points have been discussed in *Burghes* v. *Attorney-General* (2), and it is unnecessary to repeat at length our arguments on those questions.

The chief question on which we ask for a decision on this appeal is the validity of requisition (*i*) of Form 4. We submit that it is justified by the terms of s. 26, sub-s. 2, of the Finance (1909-1910) Act, 1910. This estimate "may properly be required for the purpose of the valuation of land." That this is so is shewn by the fact that by sub-s. 3 an owner may furnish an

(1) Sect. 26 of the Finance (1909-1910) Act, 1910, is as follows:—

"26. (1.) The Commissioners shall, as soon as may be after the passing of this Act, cause a valuation to be made of all land in the United Kingdom, showing separately the total value and the site value respectively of the land, and in the case of agricultural land the value of the land for agricultural purposes where that value is different from the site value. Each piece of land which is under separate occupation, and, if the owner so requires, any part of any land which is under separate occupation, shall be separately valued, and the value shall be estimated as on the thirtieth day of April nineteen hundred and nine.

"(2.) Any owner of land and any person receiving rent in respect of any land shall, on being required by notice from the Commissioners, furnish to the Commissioners a return containing such particulars as the Commissioners may require as to the rent received by him, and as to the ownership, tenure, area, character, and use of the land, and the consideration given on any previous sale or lease of the land, and any other matters which may properly be required for the purpose of the valuation of the land, and which it is in his power to give, and, if any owner of land or person receiving any rent in respect of the land is required by the Commissioners to make a return under this section, and fails to make such a return within the time, not being less than thirty days, specified in the notice requiring a return, he shall be liable to a penalty not exceeding fifty pounds to be recoverable in the High Court.

"(3.) Any owner of land may, if he thinks fit, furnish to the Commissioners his estimate of the total value or site value or both of the land, and the Commissioners, in making their valuation, shall consider any estimate so furnished."

(2) Post, p. 173.

C. A. 1911 — DYSON v. ATTORNEY-GENERAL.

estimate of the value of his land if he thinks fit. The Commissioners are therefore entitled to ask for these particulars, and if the owner and occupier gives them "so far as it is in his power," as required by Part I. of the Form, he can safely sign the declaration that "the foregoing particulars are in every respect fully and truly stated." That declaration refers only to particulars which he has stated.

By the "Instructions for making returns on Form 4" it is provided that "if any person called upon to make a return is unable to give all the information required, he should furnish all the particulars which it is in his power to give, and insert the words 'not known' in the spaces which he is unable to fill up." The plaintiff might have done that, and it would have been consistent with the declaration that the particulars were truly stated.

[FARWELL L.J. Can a requisition asking for an opinion be answered by the words "not known"?]

If he had simply struck out requisition (*i*) and answered all the others no penalty could have been recovered.

[FARWELL L.J. Requisition (*i*) asks for an admission, not for information. The Act only authorizes requisitions as to the facts.]

[FLETCHER MOULTON L.J. The requisition only asks for the opinion of the owner and occupier, and that opinion is useless for any purpose. It is not evidence of value.]

[COZENS-HARDY M.R. Sect. 26 draws a distinction between fact and estimate.]

Even if requisition (*i*) is unauthorized that does not affect the validity of the other requisitions. They are valid at all events as against a man who does not occupy any land and therefore is unaffected by requisition (*i*); but we contend that they are also valid against an occupier.

Danckwerts, K.C., *Felix Cassel, K.C.*, and *A. Neilson*, for the plaintiff. The Commissioners have threatened us with penalties if we do not comply with requisition (*i*), which they have no authority to make, and we ask for a declaration that we are under no obligation to do so. Only one notice was sent, but it relates to all the six forms, and it contains threats. The forms

are absolutely void because we are called upon to make the returns to an appointed officer instead of to the Commissioners as provided by the Act. It might be very inconvenient to make returns to one of our neighbours who is in no way bound to secrecy. Again, the forms are void because the notice does not give us the full statutory period of thirty days within which to make the returns. Further, they are void because they contain requisition (*i*), which is illegal. Sect. 26 authorizes requisitions on questions of fact and directs that the making of returns on such matters shall be compulsory; but it says that estimates may be furnished voluntarily. No penalty can be imposed for not supplying estimates. Form 4 must be treated as a whole, and if a man is not bound to answer one requisition contained in it he is not bound to answer any of them. The requisitions stand or fall together. On that ground the form was void as addressed to owners who are also occupiers.

Sir Rufus D. Isaacs, A.-G., in reply.

Cur. adv. vult.

Judgment was delivered in *Burghes* v. *Attorney-General* (1) on the same day as that in the present case, and the judgments in both cases should be read together.

Nov. 17. COZENS-HARDY M.R. This is an appeal from a judgment of Horridge J. declaring that Form 4, under the Finance Act, as delivered to the plaintiff, is unauthorized, and that the plaintiff is not under any obligation to comply with the requisitions contained in a notice sent to the plaintiff. No reasoned judgment was delivered by Horridge J., because it was admitted by counsel, first, that this Court had held on an interlocutory appeal in the case (2) that an action of this nature may be maintained against the Attorney-General; and, secondly, that a decision of Warrington J. in *Burghes' Case* (3), which is also under appeal, was directly in point.

On the first point, the views expressed were perhaps not necessary for a decision of the interlocutory appeal and might

(1) Post, p. 173. (2) [1911] 1 K. B. 410.
(3) [1911] 2 Ch. 139.

C. A. 1911

DYSON v. ATTORNEY-GENERAL.

Cozens-Hardy M.R.

be regarded as obiter. But I adhere to what I then said, and I hold that an action in this form may be maintained.

On the second point, it is necessary to consider minutely the facts alleged in the pleadings and admitted by the Attorney-General. The plaintiff is the owner of six properties at Weeton, of which five are occupied by tenants, the remaining one being in his own occupation. On August 9 he was served with six notices dated August 4. They purport to be given under the powers conferred by s. 26 of the Finance (1909-1910) Act, 1910. So far as I am aware, no other statutory justification is alleged. Sect. 26 contemplates a valuation of each piece of land under separate occupation, and it imposes an obligation on every owner to comply with, not any requisition which the Commissioners may think fit to make at any time, but certain definite requisitions at a definite time. The material words as to time are perfectly clear.

If the owner fails to make a return "within the time not being less than thirty days specified in the notice requiring a return" he is liable to a penalty not exceeding 50*l*. Now the plaintiff was required on August 9 to make the return "within thirty days from this date," i.e., from August 4. In my opinion this is a fatal objection to all the six notices. No obligation was imposed thereby on the owner. They were mere waste-paper. This is sufficient to dispose of the appeal. But the Attorney-General, without prejudice to his objection that the Court has no right to criticize or make any declaration in respect of Form 4, suggested that we should express our views upon certain points of general interest and importance, not depending upon the date of receipt of the notice, and I am willing to assist the Commissioners in this respect.

The first objection is that Form 4 requires the return to be delivered "to the appointed officer Hugh Bateson," whereas s. 26 only requires the return to be furnished "to the Commissioners." I think it is matter for regret that the delivery is required to be made to a local officer, who, as the Attorney-General admits, is not in all cases under an obligation of secrecy. It would be more satisfactory if an express option were given to deliver the return either to the Commissioners at Somerset

House or to the local officer. The average owner can scarcely be expected to understand that he would be entitled to make his return direct to the Commissioners at Somerset House, although told to deliver it to Hugh Bateson at Kirkby Overblow. Warrington J. has held in *Burghes' Case* (1) that the form is unauthorized in this respect. It is not without hesitation that I have come to a different conclusion. But upon the whole the requirement for delivery to the "appointed officer" of the Commissioners does not in my opinion invalidate the form.

The next point concerns only the owner who is also the occupier. The form is headed "Return to be made," with a note that there is a penalty for failure to make a due return not exceeding 50*l*. It is divided into two parts, the first of which is headed "Particulars required by the Commissioners must be furnished so far as it is in the power of the persons making the return to give them." Nothing turns upon the particulars except (*i*), for the others all relate to matters of fact, and may be of use in enabling a valuation to be made. The words of s. 26, sub-s. 2, are wide—"such particulars as the Commissioners may require as to the rent received by him, and as to the ownership, tenure, area, character, and use of the land, and the consideration given on any previous sale or lease of the land, and any other matters which may properly be required for the purpose of the valuation of the land, and which it is in his power to give." But (*i*) is of a wholly different nature—"If the person making the return is also the occupier state the annual value—i.e., the sum for which the property is worth to be let to a yearly tenant, the owner keeping it in repair."

This is a departure from the region of fact into the region of hypothesis and opinion. The answer would not be evidence of the annual value, and I am clearly of opinion that this particular cannot be "properly required for the purpose of the valuation." It seems to be an attempt to extort from the owner an admission which may be used against him, and I can find nothing in the Act to warrant it. The conclusion at which I have arrived on the construction of sub-s. 2 is strengthened by sub-s. 3, which enables, but does not compel, an owner to make an estimate of

(1) [1911] 2 Ch. 139.

C. A. 1911 DYSON v. ATTORNEY-GENERAL. Cozens-Hardy M.R.

value. The distinction between evidence of a fact and an estimate or an opinion is vital. I should add that this objection applies only to that one of the six forms which was addressed to the plaintiff as owner and occupier.

The third point is as to the effect of the insertion of (*i*) in the Form. Does it leave the occupying owner liable to furnish all the particulars except (*i*), or does it invalidate the whole Form? In my opinion the latter is the correct view. The declaration at the foot of Part I. of the Form is as follows: "I hereby declare that the foregoing particulars are in every respect fully and truly stated to the best of my judgment and belief." The requirement is for a return containing an answer to all the particulars, including (*i*), and that is not authorized. The penalty is imposed for failure to make "such a return" as the Commissioners require. The return is one and indivisible. No penalty could be exacted for omitting to make an unauthorized return. I decline to read the notice as requiring a return of the particulars so far and so far only as they can lawfully be required by the Commissioners. In my opinion Form 4, so far as an occupying owner is concerned, is unauthorized and imposes no obligation upon the owner.

In my judgment on the interlocutory appeal, to which I adhere, I pointed out that the jurisdiction to make a declaratory order is discretionary. And it has been urged by the Attorney-General that in our discretion no order ought to be made. I am bound to say that, assuming the jurisdiction to exist, I cannot imagine a more proper case for its exercise. It is no light matter for the Commissioners to issue broadcast forms which purport to impose obligations which do not exist and which add a threat of a penalty in case of non-compliance. A general declaration is pre-eminently desirable in these circumstances. And I am a little surprised that the Commissioners do not welcome a decision which will guide their action in the future. Their contention that no Court should interfere unless and until a penalty is sued for seems extravagant. The result is that, in my opinion, the appeal in Dyson's case must be dismissed.

FLETCHER MOULTON L.J. This is an action brought by John Dyson against the Attorney-General, as representing the Crown,

praying for a declaration that he is under no obligation to comply with a notice, dated August 4, 1910, sent to him by the Commissioners of Inland Revenue, purporting to be a notice to make returns under the provisions of the Finance (1909-1910) Act, 1910. The defendant in his defence claims that this Court has no jurisdiction to make the declaration asked for, and traverses all the allegations in the statement of claim.

The facts of the case are not in dispute. The notice to which the action refers is in the form of a letter from the Commissioners to the plaintiff, dated August 4, 1910. It was accompanied by six blank forms (all of the form known as Form No. 4) relating to six parcels of land of which he was the owner and of one of which he was also the occupier. By that letter he was required to fill up and return these forms within thirty days of the date of the letter to "the appointed officer Hugh Bateson," whose address is given, and it further states that failure to do so within the time specified in the notice will make the plaintiff (who is admittedly a person who can be required to make a return under the provisions of the Act) liable to a penalty not exceeding 50*l*.

The point of law raised by the defendant, to the effect that this Court has no jurisdiction to entertain the action or grant the declaration asked for, is only formally before us on this occasion. The same point was raised by the defendant by an interlocutory application to the Court to dismiss the action on the ground that it was frivolous and vexatious and on the ground that no cause of action was disclosed by the statement of claim. The Court refused to dismiss the action in this summary way, and the majority of the members of the Court in their judgments laid down that it was a proper form of action in which to try the questions proposed to be raised by the plaintiff, and that the Court had the jurisdiction to make the declaration prayed for. I was a member of the Court that heard the application and concurred with the rest of the Court in dismissing it, but I did not formally give any decision upon the point decided by my brethren because in my view it was sufficient to decide that it was not a case for the exercise of our powers of summarily stopping an action before trial. It is not in accordance with the practice of the Court, nor is it desirable, to refuse to allow cases raising

C. A. 1911 DYSON v. ATTORNEY-GENERAL. Fletcher Moulton L.J.

points which involve serious argument to go to trial so that the parties may have them decided in the ordinary way at the trial and may enjoy the rights of appeal following from their being so decided. I therefore contented myself with deciding that the application should be refused. But I was fully in agreement with my brethren in the conclusions to which they came on the other points, and more especially I wish to express my hearty concurrence in the views they expressed on the argument ab inconvenienti. So far from thinking that this action is open to objection on that score, I think that an action thus framed is the most convenient method of enabling the subject to test the justifiability of proceedings on the part of permanent officials purporting to act under statutory provisions. Such questions are growing more and more important, and I can think of no more suitable or adequate procedure for challenging the legality of such proceedings. It would be intolerable that millions of the public should have to choose between giving information to the Commissioners which they have no right to demand and incurring a severe penalty. There must be some way in which the validity of the threats of the Commissioners can be tested by those who are subjected to them before they render themselves liable to penalty, and I can conceive of no more convenient mode of doing so than by such an action as this.

The next question is whether the notice is in conformity with the Act. I cannot see any possibility of deciding this otherwise than in favour of the plaintiff. The notice states that the return has to be delivered to the appointed officer within thirty days of the date of the notice, namely, August 4. It is therefore a notice to make the return on or before September 3. It goes on to state that if the plaintiff does not make a return within that specified time he is liable to a penalty not exceeding 50*l*. The notice is given under the provisions of s. 26, sub-s. 2, of the Act. On referring to the language of that sub-section it is seen that liability to the penalty depends on the failure to make a return within the time specified in the notice, but it is enacted that that time must not be less than thirty days. It follows, therefore, that the Commissioners appointed a date for

the return which was not in conformity with the provisions of the Act, and, therefore, the plaintiff was not bound to make the return by the date specified or liable to any penalty for not doing so. The statement to the contrary in the notice was therefore unauthorized by the statute.

It is clear that under such a notice no penalty could be imposed, nor do I think that on the proper construction of the whole sub-section did such a notice create an obligation to make a return at all. The obligation is indicated by the sanction by which it is proposed to enforce it, and therefore it was an obligation to make a return on or before the specified date. Inasmuch as that date was one which did not comply with the provisions of the Act we may take it as though no date was specified and therefore no obligation to make a return at any date at all. This point therefore goes to the root of the question and is itself sufficient to entitle the plaintiff to the first declaration asked for, which of course is so general as to cover the ground of the other declarations.

But it is desired by both parties that the other points which are raised by the statement of claim should be decided by us. The first of these points is that the notice is bad because it directs the plaintiff to deliver the return to the "appointed officer Hugh Bateson" and not to the Commissioners. In my opinion this objection is not a good one. He is the officer appointed to receive the return on behalf of the Commissioners, and I can see no reason why they should not use agents to collect the very numerous returns that have to be made. In my opinion, therefore, the delivery to the "appointed officer Hugh Bateson" is a delivery to him as representing for this purpose the Commissioners and is not in excess of the powers that the Commissioners possess.

The other objection is that under (*i*) the plaintiff, in respect of one of the properties referred to in the notice, namely, the one of which he is also the occupier, is asked to "state the annual value—i.e., the sum for which the property is worth to be let to a yearly tenant, the owner keeping it in repair." Now, beyond doubt, this is a question as to opinion merely. The other inquiries are as to facts. The language of the sub-section does

C. A. 1911 DYSON v. ATTORNEY-GENERAL. Fletcher Moulton L.J.

not permit the Commissioners to ask questions as to the opinion of the owner with regard to the value of his property, and therefore this inquiry is unauthorized.

It was urged by the Attorney-General that it was for the purpose of assisting the Commissioners in the valuation of the property and therefore was a proper question. The object of the inquiry was not to obtain information, but to obtain an admission. The opinion as to the value of property of a man who is not an expert is not even evidence, and could not be admitted for the purpose of valuation in a Court of law. But if an owner in answer to such an inquiry states his opinion as to the yearly value of the property, it would be open to the Commissioners to use it as an admission if it suited them, and entirely to reject it if it did not. I am satisfied that the Act does not allow the Commissioners to put the owner or occupier of property in any such invidious position. In fairness to the Attorney-General, it is right to say that his main argument on this point was not that the Commissioners were entitled to require an answer to this inquiry, but that the fact that it was unauthorized did not justify a refusal to make the rest of the return. This contention is sound so far as the five returns are concerned which relate to lands which the plaintiff does not himself occupy, because in effect the presence of that inquiry does not affect him since it only applies to cases where the owner is also the occupier. But in the case of the sixth return, which relates to a case where he is also occupier, the point is more difficult. But seeing that the demand is for the whole of the information and that the declaration which the plaintiff has to sign relates to the whole, and moreover contains words which are intended to refer expressly to this part of the notice, the presence of this unauthorized inquiry renders the whole demand bad. It certainly renders untrue the statement that there is a penalty for not making the return demanded.

I am of opinion, therefore, that the decision of the learned judge was right, and that this appeal should be dismissed.

FARWELL L.J. This appeal arises under s. 26 of the Act and relates to Form 4. The plaintiff's first objection is to (*i*): "If the

person making the return is also the occupier state the annual value—i.e., the sum for which the property is worth to be let to a yearly tenant, the owner keeping it in repair." I am of opinion that this is not authorized by the Act: if it can be justified at all, it must be under the words "and any other matters which may properly be required for the purposes of the valuation of the land." But the valuation to be made by the Commissioners must be made in accordance with the usual rules of law: the opinion of the owner (not being an expert) as to the value of his or her land is not only immaterial but is inadmissible on the issue of value; the only object of the question appears to be to compel the owner to commit himself or herself to some admission by estimate, and this too in the face of sub-s. 3 of the same s. 26, which expressly authorizes the owner to furnish the estimate of value if he thinks fit. It is, in my opinion, unjustifiable in the face of this sub-section to attempt to compel the owner to give an estimate of value.

The next contention is that the insertion of this unauthorized requisition makes the whole demand unauthorized and relieves the owner from any obligation to answer, and I am of opinion that this is so. The duty imposed by the Act on owners is to make such a return as is required by the Commissioners under a penalty of 50*l*. The duty and the penalty for disobedience are both one and indivisible and are co-extensive, and if the Commissioners frame their requisition with so little care as to exceed their powers, the whole demand and not merely the ultra vires portion becomes unenforceable. This statute is not merely a taxing Act, but is a taxing Act coupled with duties to supply information of a most onerous character, and entailing great expenditure of time and trouble, and in many cases of money also, with heavy penalties attached. To such an Act of all others the statement of Lord Cairns in *Partington* v. *Attorney-General* (1) applies: "If there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute." It is impossible to split the requisition into good and bad, and hold that the demand

(1) (1869) L. R. 4 H. L. 100, 122.

C. A. 1911 DYSON v. ATTORNEY-GENERAL. Farwell L.J.

may be good so far as the requisitions are good; the Act speaks of a return, not of part of a return, and gives a penalty for not making "such return"; these forms have been sent out by millions, and the majority of the recipients are not lawyers, and have not the Act before them when they receive the forms.

It is the duty of the Commissioners to take proper care that their demands do not exceed their jurisdiction, and all the more so because of the enormous number of their fellow-subjects who are affected, and put to inconvenience and expense by their errors. Many owners, conscious of their inability to answer requisition (*i*), may have thought themselves bound to obtain and pay for expert advice, an expense to which the Commissioners were not warranted in putting them. But there is another objection equally fatal to the validity of this notice and form. The Commissioners are authorized to require under a penalty of 50*l*. a return to this requisition "within the time, not being less than thirty days, specified in the notice": the time in fact specified in the plaintiff's notice is twenty-five days: there is no power given to the Commissioners to make any such requirement, and their notice is therefore unauthorized and of no effect.

This applies to all the six notices: the objection under (*i*) to one only.

The next objection as to the person to whom the notice is to be sent I think unfounded for the reason explained in *Burghes' Case*. (1)

I think it clear that the Commissioners are insisting on the returns being made and that the plaintiff is entitled to the declaration made in his favour, and I adhere to my judgment delivered on the interlocutory application in this case in all respects.

Solicitors: *Solicitor for Inland Revenue; Simpson, Thomas & Clark, for Simpson, Thomas & Curtis, Leeds.*

(1) Post, p. 173, at p. 189.

H. C. R.

BURGHES *v.* ATTORNEY-GENERAL.

C. A.
1911
Nov. 6, 17.

[1910 B. 3558.]

Revenue—Valuation of Land—Form 8—Requisitions as to Payment or Receipt of Rent without specifying Land—Requisition as to Description and Situation of Lands—Ultra vires—Return to be made to Appointed Officer—Full Statutory Time for making Return not given—Declaratory Judgment—Relief against Crown—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 26, 31.

For the purposes of the valuation of all land in the United Kingdom prescribed by s. 26 of the Finance (1909-10) Act, 1910, s. 31, sub-s. 1, of that Act provides that "Every person who pays rent in respect of any land, and every person who as agent for another person receives any rent in respect of any land, shall, on being required by the Commissioners, furnish to them within thirty days the name and address of the person to whom he pays rent or on behalf of whom he receives rent, as the case may be"; and s. 31, sub-s. 3, provides that "if any person wilfully fails to comply with the provisions of this section, he shall be liable to a penalty not exceeding fifty pounds to be recoverable in the High Court":—

Held (affirming the decision of Warrington J.), that the form—known as "Form 8—Land"—which the Commissioners had issued in purported exercise of the powers conferred by s. 31 of the Act, and which was sent by their appointed officer to the plaintiff, a rent collector, was wholly unauthorized inasmuch as it did not specify the particular parcels of land in respect of which the names and addresses were to be furnished, and also inasmuch as it required the plaintiff to give the descriptions and precise situations of the lands in respect of which rent was paid or received.

Held, further (reversing the decision of Warrington J. on this point), that it was not ultra vires on the part of the Commissioners to direct the return to be sent to their appointed officer instead of to themselves.

The form in question and the notice dated August 25, 1910, upon which it was indorsed, and which required the plaintiff to furnish the information "within thirty days from this date" to the appointed officer and referred to the penalty for wilful failure to furnish the information, were sent through the post by the appointed officer to the plaintiff and not received by him until August 26, 1910.

The effect of the want of a full thirty days' notice discussed by Cozens-Hardy M.R. and Fletcher Moulton L.J., and held by Farwell L.J. to be a fatal objection entitling the plaintiff to disregard the notice.

Note.—The questions relating to the form of action and the jurisdiction

C. A.
1911
BURGHES
v.
ATTORNEY-GENERAL.

to make a declaratory order against the Attorney-General as representing the Crown are dealt with in the judgments in *Dyson* v. *Attorney-General*, ante, p. 158.

APPEAL from a decision of Warrington J. (1)

The plaintiff was the secretary and manager of the New Century Estates, Limited, having an address at 16, Eastcheap, E.C., and a collector of rents, and in particular he received as agent for the owner the rent payable in respect of certain land in the borough of West Ham. This land happened also to be situate in that portion of the borough which, for the purposes of income tax, was a parish as defined by the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), and as such was called "Plaistow South." The designation "Plaistow South" was not for any other purpose the legal name of the district.

On August 26, 1910, the plaintiff received through the post from the Commissioners of Inland Revenue a notice requiring certain information for the purpose of the valuation of land prescribed by the Finance (1909-10) Act, 1910, and on the notice was indorsed a form, known as "Form 8—Land."

The notice and form were in the following terms :—

The Commissioners of Inland Revenue.	*Reference :* to be quoted in all communications.
	Plaistow South
	7756

DUTIES ON LAND VALUES.

NOTICE TO FURNISH INFORMATION.

Inland Revenue,
Somerset House,
London, W.C.
25 August, 1910.

To Mr. G. H. Burghes,
16, Eastcheap, E.C.

Sir,

With reference to the provisions of the Finance (1909-10)

(1) [1911] 2 Ch. 139.

Act, 1910, I am directed by the Commissioners of Inland Revenue to require you to furnish **within thirty days from this date,** (I.) the name and address of every person to whom you pay rent in respect of any land situate within, or partly within, the parish or place of Plaistow South, and (II.) the name and address of every person on behalf of whom you, as agent, receive any rent in respect of any land situate within, or partly within, the aforesaid parish or place.

The expression "land" includes all buildings and other structures thereon, and all minerals on, in, or under the surface of the land.

Forms are provided on the other side in which the required information should be inserted. When completed, the returns should be forwarded in the accompanying franked envelope to the appointed officer.

N. G. Anstey,
521, Barking Road, Plaistow,
London, E.
Land Valuation Officer.

Any person who is required to furnish the information specified above and wilfully fails to do so within the time limited in this notice is liable to a penalty not exceeding £50.

I am, Sir,
Your obedient servant,
F. Atterbury,
Secretary.

FORM 8.—LAND.

[Indorsed] **I.—Form to be filled up by every person who pays rent in respect of any land within the aforesaid parish or place.**

Note.—If you do not pay rent in respect of any land you should insert the word "**Nil**" on this form, and sign the

C. A. 1911

BURGHES v. ATTORNEY-GENERAL.

declaration below. It is not sufficient to leave this space blank.

Names of persons to whom rent is paid.	Addresses of persons to whom rent is paid.	Descriptions and precise situations of the lands in respect of which rent is paid.

II.—Form to be filled up by every person who as agent for another person receives any rent in respect of any land within the aforesaid parish or place.

Note.—If you do not receive any rent as agent for another person, you should insert the word "**Nil**" on this form, and sign the declaration below. It is not sufficient to leave this space blank.

Names of persons on whose behalf rent is received.	Addresses of persons on whose behalf rent is received.	Descriptions and precise situations of the lands in respect of which rent is received.

I hereby declare that the foregoing particulars are in every respect fully and truly stated to the best of my judgment and belief.

Dated this_____day of_____, 191 .

_____Signature.

_____Address.

The plaintiff did not fill up and return the form as required by the notice within thirty days of its date.

On or about September 30, 1910, the plaintiff received through

the post a "reminder" (Form 14—Land) which was in the following terms:—

Reference
7756
Plaistow South

Inland Revenue,
Somerset House, W.C.,
30th September, 1910.

Mr. Burghes,
16, Eastcheap, E.C.

Sir,

I have to request that you will, without further delay, complete and return to the appointed officer,

N. G. Anstey,
521, Barking Road, Plaistow,
London, E.,
Land Valuation Officer,

the form sent to you requiring you to furnish information as to the names and addresses of any persons to whom you pay rent, or for whom you, as agent, receive rent.

I beg to point out that any person who wilfully fails to make the prescribed returns is liable to a penalty not exceeding £50.

This reminder is issued as a matter of courtesy only and not of right, and is without prejudice to any action that may be taken by the Commissioners in consequence of any failure to make returns in due time.

I am, Sir,
Your obedient servant,
F. Atterbury,
Secretary.

The plaintiff did not comply with this request.

On October 25, 1910, the plaintiff commenced this action against the Attorney-General, as representing the Crown, for a declaration that the form was illegal, unauthorized, and ultra vires, and that he was not under any obligation to comply with the requisitions of the form or any of them.

C. A. 1911 — BURGHES v. ATTORNEY-GENERAL.

In his statement of claim and further particulars the plaintiff alleged, and at the trial before Warrington J. contended, that the notice was not within the authority conferred by the Act under which it purported to be given, for the following reasons:— (1.) Because it asked for the names and addresses of the persons on whose behalf the plaintiff received rent in respect of any land in the district mentioned, whereas the Commissioners were only entitled to require that information in respect of particular land to be specifically mentioned in the notice; (2.) because it in effect required him to state in respect of what land he received rent, this demand being unauthorized; (3.) because it required him to give the information not (as provided by the Act) to the Commissioners, but to the land valuation officer; (4.) because, if the notice were otherwise justified, the description "Plaistow South" was not a proper description of the locality. The plaintiff also alleged and contended that inasmuch as the form was sent through the post and was not received by him until August 25 he did not have the full statutory period of thirty days for compliance, and was on that ground not liable for penalties even if the notice was in other respects proper.

Warrington J. made a declaration that the notice in the statement of claim mentioned was unauthorized and that the plaintiff was not under any obligation to comply with the requisitions contained therein or any of them. He held that the notice exceeded the statutory authority in requiring (1.) the plaintiff to give the description and precise situation of the land, (2.) the plaintiff to give the information in respect of any land in the district mentioned without specifying the particular land about to be valued, and (3.) the plaintiff to send the return to any one but the Commissioners themselves. But with regard to the further objections raised by the plaintiff, his Lordship did not attribute any importance to the description "Plaistow South," for, in his opinion, if the notice had been otherwise justified, the district in reference to which information was required was sufficiently identified, and if the objection had stood alone he would not have held the notice to have been unauthorized. On the question of the want of a full thirty days' notice, he said that inasmuch as the writ was not issued until October 25, long after

the period had elapsed since the receipt of the notice on August 25, he would not on this ground alone have held the plaintiff entitled to the declaration. He further held, following *Dyson* v. *Attorney-General* (1), that the plaintiff's action was properly constituted as to parties, and that the Court had jurisdiction in its discretion to make the declaration claimed by the plaintiff, and that the case was one in which the discretion should be exercised in the plaintiff's favour.

The Attorney-General appealed from this decision, and the appeal was heard by the Court immediately before the appeal in the similar action of *Dyson* v. *Attorney-General*, relating to the validity of Form 4, reported ante, p. 158, and the Court reserved their judgments after hearing the arguments on both appeals.

Sir Rufus D. Isaacs, A.-G., Sir J. A. Simon, S.-G., S. A. T. Rowlatt, and *Austen-Cartmell*, for the appellant. Having regard to the decision in *Dyson* v. *Attorney-General* (1) it is not open to us to contest in this Court the following questions:— (1.) Whether in the circumstances this suit can be brought against the Attorney-General; (2.) whether, assuming that the Attorney-General is a proper party, the declaration sought can be made against the Crown; and (3.) whether, in the exercise of the discretion of the Court, such a declaration should be made in this particular case; but we desire to reserve those questions in the event of an appeal from the decision of this Court.

In order to obtain the information necessary to enable them to make the valuation of land prescribed by s. 26, sub-s. 1, of the Act (2), the Commissioners issued this notice with Form 8 indorsed on it in pursuance of the powers given to them by s. 31, sub-s. 1, of the Act. (2) To this notice five objections have been taken by the plaintiff, namely, (1.) that it required the names and addresses of persons on whose behalf the plaintiff received rent in respect of any land in the district without specifying the particular land; (2.) that it required him to state in respect of what land he received rent; (3.) that it required him to give the information to the valuation officer and not to the Commissioners. These are the substantial points on which this appeal

(1) [1911] 1 K. B. 410. (2) See note on p. 190, post.

C. A. 1911

BURGHES v. ATTORNEY-GENERAL.

has to be argued, because with regard to the fourth objection, that Plaistow South was not a proper description, the learned judge held on the evidence that the locality was sufficiently identified, and with regard to the fifth objection, that the plaintiff did not receive the full thirty days' notice, the learned judge did not proceed on that ground alone.

We submit that all that the notice or form does is to call on the person to give the information prescribed by the statute, and that nowhere is there any threat in either the notice or the form. The reference to the penalty is merely a statement of the result of failure to make the return, and the suggestion made on behalf of the plaintiff that this is a threat by the Commissioners is founded on a misconception, for the person to sue for the penalty would be, not the Commissioners, but the Attorney-General, and then only if after due consideration he thought proceedings advisable.

With regard to the plaintiff's first and second objections, there is, we admit, no statutory provision that the person shall give the information referred to in the third column of the form relating to the description and precise situation of the land in respect of which rent is paid, but the third column is put as a matter of convenience, and is sometimes filled up by the officer who sends out the form, but in this particular case it was not so filled up, and we do not contend that the Commissioners have any right to call on persons to fill up that column.

[FLETCHER MOULTON L.J. But they do. Just look at the note to the form—"It is not sufficient to leave this space blank"; you do not call a man "Nil." Nor would the Commissioners have used the word "precise" if they had meant it to apply to themselves.]

Neither the accompanying notice nor the reminder refers to the description or situation of the land; they comply strictly with the statute and only require names and addresses, and their statement with regard to the penalty shews clearly that the offence is, not in not filling up the form, but in not furnishing the names and addresses,—which might have been sent on a post-card,—and that there was no threat in connection with failure to give the information specified in the third column.

Even if that column was unauthorized in this respect, we submit that that does not invalidate the form or justify the declaration made by Warrington J.

Then with regard to the land in question; it is not open to doubt; the information is required with reference to any land within the district of Plaistow South in respect of which the plaintiff pays or receives rent. Sect. 31, sub-s. 1, is the starting point for the obtaining of the preliminary information, and it is not necessary before requiring the information specified in that sub-section to state the precise land.

[FLETCHER MOULTON L.J. The words "each piece" and "separate occupation" in s. 26, sub-s. 1, and s. 31, sub-s. 4, shew that it was intended that the particular land should be specified.]

It is quite possible for an agent to give the names and addresses of the persons for whom he receives or pays rent.

[COZENS-HARDY M.R. Do you say that the Commissioners can go to a large estate agent and say to him "Tell us for whom you collect rents in the county of Middlesex"?]

That would, we submit, be quite good. He would get it from his books; and the burden is on him in any case.

[FARWELL L.J. I do not think the Act meant to put busy men to all that trouble without any payment. If the particular land is specified, it is not quite so bad, but otherwise it would impose a very serious burden on them.]

Then with regard to the objection against the return being sent to the land valuation officer. We submit that the Commissioners were entitled to appoint an agent, and Anstey was their duly appointed agent. That appears from the franked envelope. It has been argued that the Act says that the return should be made to the Commissioners, and that therefore they cannot compel it to be made to their agent, but it might just as reasonably be said that the notice sent by the secretary to the Commissioners was not good and might have been torn up.

On the question whether the declaration should be made, we cannot in the circumstances deny the jurisdiction of the Court to make it: *Hodge* v. *Attorney-General* (1); *Dyson* v. *Attorney-General.* (2) There is no precedent for such a declaration as

(1) (1839) 3 Y. & C. Ex. 342. (2) [1911] 1 K. B. 410.

C. A. 1911

BURGHES v. ATTORNEY-GENERAL.

this. Order xxv., r. 5, gives the Court a discretion, but it must be exercised with extreme care. There is no cause of action here. There is no contract or tort, and it cannot be suggested that there can be any right of action against the Attorney-General except for this declaration which is sought against the Crown.

We submit that Warrington J. has gone too far and that the plaintiff ought not to get off answering the whole of Form 8. The whole form was declared to be unauthorized because the particular land was not specified and because the Commissioners had no right to ask that the return should be sent to their appointed officer. This latter ground is much the more far-reaching, but we ask for the decision and declaration of the Court on both points.

Danckwerts, *K.C.*, and *W. Allen*, for the respondent. On the question as to the thirty days' notice we submit that the case is conclusive and that the Commissioners were clearly out of time.

With regard to the other objection, what they have attempted to do is to make a requisition as to the land. In effect they ask "Do you receive or pay rent for or to anybody? and, if so, give the name and address and define the land." We submit that that is wholly bad.

The duties imposed by the Act, namely, increment value duty, reversion duty, and undeveloped land duty, all relate to specific parcels of land the inherent or adventitious incidents of which cause the duty. Sect. 26, sub-s. 1, s. 27, sub-ss. 1 and 2, s. 31, sub-ss. 1, 2, and 4, of the Act, and s. 5 of the Revenue Act, 1911 (1 & 2 Geo. 5, c. 2), which amends s. 26, sub-s. 1, of the principal Act, all go to shew that the whole of the machinery for collecting the duties is to be with reference to specific land. "Plaistow South" is a nebulous sort of place only to be found by going to the books of the Income Tax Commissioners. This land was all rated and the Commissioners could have easily obtained this information for themselves. We submit that they were clearly not entitled to ask for the description and precise situation of the land or to ask for the names and addresses in respect of "any" land without specifying it.

Further, we say that the only right which the Commissioners

had under s. 31, sub-s. 1, of the Act was to require the return of the form to themselves. But this notice and form and the reminder and the reference to the penalty amount and were intended to amount to an order that the return should be sent to their appointed officer, N. G. Anstey. He is not the land valuer, but simply the man to send out and get in these returns; he may be the village blacksmith or, may be, a rival in trade, as is the case here, for Anstey is a practising land agent in this neighbourhood, and that obviously creates a very serious objection. There is no obligation of secrecy on the part of these appointed officers, as there is under the Income Tax Acts, and that is also another grave objection. I agree that the Commissioners may appoint an agent to receive the notices, but a person is entitled to return the form direct to them. This notice, however, does not give him any option in the matter, but orders him to send the return to the appointed officer. We submit that Warrington J.'s decision and declaration are right.

Sir Rufus D. Isaacs, A.-G., in reply. The argument as to the appointed officer is only prejudice.

[Cozens-Hardy M.R. I cannot help regretting that the Commissioners had the returns sent to this man.]

He is also an income tax collector, and as such had to make a declaration of secrecy, and he is not in fact required to make another one if he is appointed under this Act. He has nothing to do with the valuation of the land, but only collects the forms and enters up the information, and then sends Notice I. and Form 4 to the owner.

Cur. adv. vult.

On November 17 the Court delivered their reserved judgments in *Dyson* v. *Attorney-General* (1) and then proceeded to deliver the following judgments in this action. The judgments on both appeals should be read together.

Cozens-Hardy M.R. This is an appeal from a judgment of Warrington J. and depends upon the validity of Form 8. The observations I have made in *Dyson's Case* (1) to a large extent

(1) Ante, p. 158.

C. A. 1911

BURGHES v. ATTORNEY-GENERAL.

Cozens-Hardy M.R.

apply to this appeal, and I shall not repeat them. There are, however, several points of distinction.

Form 8 purports to be issued under the powers conferred by s. 31, which requires every person who pays rent in respect of any land and every person who as agent for another person receives any rent in respect of any land on being required by the Commissioners to furnish within thirty days the name and address of the person to whom he pays rent or on behalf of whom he receives rent as the case may be. The language seems free from ambiguity. The information is required in respect of some particular parcel of land to be specified. It is to enable s. 26 to be brought into play. The section does not go beyond this.

Now Form 8 requires the person to whom it is addressed to give "descriptions and precise situations of the lands in respect of which rent is paid." Burghes, who is a rent collector, is required to give these particulars as to any land situate within or partly within the parish or place of Plaistow South. In my opinion this imposes a burden upon him which is wholly unauthorized. The Attorney-General scarcely attempted to defend the third column in which this requirement is made. The form is really waste-paper. It relates to no specific land. It imposes no obligation of any kind. This is sufficient to dispose of the appeal.

There is a point as to time. The notice is dated August 25, but was not served until August 26. It requires the information to be furnished within thirty days "from this date"—i.e., from August 25. The language of s. 31, sub-s. 1, is not as strong as the corresponding language in s. 26. If there were no other objection, I should not, without further consideration, hold the plaintiff entitled to a declaration merely on the ground that the original notice gave him only twenty-nine days instead of thirty.

In my opinion the judgment of Warrington J. is perfectly correct, except as to the appointed officer, and the appeal must be dismissed.

FLETCHER MOULTON L.J. This action is in its character similar to the action of *Dyson* v. *Attorney-General* (1) save that it

(1) Ante, p. 158.

relates to Form 8, issued under s. 31 of the Finance (1909-10) Act, 1910, and not to Form 4, issued under s. 26. There are, however, certain differences in detail which require separate consideration.

In the first place the statutory obligation as to time is to furnish the information to the Commissioners within thirty days of being required by them so to do. It does not therefore depend on the fixing of a proper date by the Commissioners, but is a statutory obligation entirely. The notice states the obligation incorrectly because it requires the plaintiff to furnish the information within thirty days from the date of the notice, which is dated some days before its actual service, and the statement, therefore, which it contains to the effect that the person who wilfully fails to furnish the information within the time limited in the notice is liable to the penalty is also incorrect.

For practical purposes this seems to me to lead to the same result as the similar defect in the notice in *Dyson's Case* (1) because the Commissioners would undoubtedly feel bound to correct immediately a mistake of this kind in a notice officially issued by them. But from a purely legal point of view the consequences may be different. It may be that the misstatements with regard to the date at which the information must be furnished do not relieve the plaintiff from the statutory obligation to give the proper information within the statutory period of thirty days. But in any case the Commissioners are bound to see that their notice contains no unauthorized statement substantially equivalent to a threat.

By the notice the plaintiff is directed to forward the return, when completed, to the appointed receiver, N. G. Anstey, 521, Barking Road, Plaistow. For the reasons given in my judgment in the *Dyson Case* (1) I am of opinion that this was not ultra vires on the part of the Commissioners and constitutes no objection to the notice. But it is to be regretted that the Commissioners should have taken this course if, as stated at the Bar, the "appointed officer" is a practising land agent in the neighbourhood. The notice is addressed to a land agent and requires him to give the names and addresses of the persons for whom he

(1) Ante, p. 158.

C. A. 1911 BURGHES v. ATTORNEY-GENERAL. Fletcher Moulton L.J.

collects rents and the lands in respect of which the rents are so collected. One cannot but feel that to require such returns to be made by one land agent to a rival unnecessarily increases the annoyance to the public caused by the exercise of their functions by the Commissioners. This is more striking if, as we learn from the Attorney-General, the appointed officer has nothing to do with valuation and there was therefore no reason why a person in the position of a land agent should be selected for the purpose.

The critical point in this case, however, is whether the information demanded by the notice is that which the Commissioners are entitled to demand under the provisions of s. 31. The form which is required to be filled up consists of three columns headed respectively—" (1.) Names of persons on whose behalf rent is received; (2.) Addresses of persons on whose behalf rent is received; (3.) Descriptions and precise situations of the lands in respect of which rent is received." There is a similar form with regard to the payment of rent to which the same considerations must apply and to which, therefore, I need not separately refer.

The Attorney-General admits that the Commissioners have no right to demand the information asked for under the third head, namely, "Descriptions and precise situations of the lands in respect of which rent is received," an admission which, considering the duties and responsibilities of the Commissioners, amounts to my mind to an admission that the notice is unauthorized. But the defect is not merely that the demand is in excess of the powers of the Commissioners. To my mind it is radically different from that which they are entitled to make under the section.

Sect. 31, under which the notice in this case was given, is directed to enabling the Commissioners to ascertain the names of the persons who pay rent or who as agents for others receive rent in respect of any land. Sub-s. 1 reads as follows: [His Lordship read the sub-section, and continued.] I have no doubt that the meaning of this sub-section is that the Commissioners may in respect of any specific land require from a person who pays rent for such land the name and address of the person to

whom he pays it and from a person who as agent for another receives any rent in respect of such land the name and address of the person on whose behalf he receives such rent. The inquiries are to be in respect of a specified parcel of land. If the language of sub-s. 1 left any doubt on my mind in that respect it would be cleared up by the language of sub-s. 4, which makes the name and address so given sufficient for service on any owner or person interested. This sub-section would be meaningless if the name and address were not given in respect of some specific piece of land, and in further confirmation of this I may point out that in default of the address being ascertained the service may be effected by causing a notice, &c., to be put up in some conspicuous place on the land, phraseology which shews that the whole of the sub-section and by implication sub-s. 1 relate to specific plots of land with regard to which the name and address of the owner or person interested have been obtained under sub-s. 1 or are unknown as the case may be.

The proper form, therefore, in which the request ought to have been made is that the person to whom it was addressed should have been required to give in respect of specified plots of land the names and addresses of the persons to whom he paid rent or for whom he received it. In other words, the third column of the form ought to have come first and the description of the plot of land with regard to which the inquiry was made should have been inserted in it by the Commissioners.

In its present form the request is not only unauthorized, but meaningless. It asks the name and address of the owner of unspecified land. This is hardly denied by the Attorney-General. He admits that it was a mistake that the third column was not filled up by the Commissioners, though he seeks to establish that in default of their filling it up the person to whom the notice is given must set out a string of names and addresses of all the persons to whom he pays rent or for whom he receives it. As I have said, this is not the meaning of the section. Its object and effect are to enable the Commissioners to obtain the information with regard to the specific parcels of land with regard to which they ask it and nothing more. This defect is fundamental and in my opinion nullifies the whole of the notice and renders the

C. A. 1911

BURGHES v. ATTORNEY-GENERAL.

demand that the form shall be filled up one that is in all respects unauthorized.

I am therefore of opinion that this appeal should also be dismissed.

FARWELL L.J. It is admitted by the Attorney-General that s. 31 of the Act gives the Commissioners no right to require the agent or tenant to give the description and situation of the land and that the Commissioners' usual practice is to specify particulars of such land themselves; but he nevertheless insists that the Court ought to make no declaration, but should dismiss the action with costs. I have some difficulty in following his reasoning. When once it is admitted that the plaintiff is not bound to supply the particulars of the land and the Commissioners have not done so, the questions asked become insensible. It is as useless as to ask the name of the wife of " living in London " (leaving a blank for the name). Notwithstanding this, the Attorney-General refuses to withdraw the notice and insists that the form must be filled in.

I assume, therefore, that notwithstanding his admission he means that the Commissioners are entitled to administer a general interrogatory to estate agents " Do you collect any and what rents for any and what person or persons in any and what place or places? " I am of opinion that this is quite inadmissible.

The Commissioners in making valuations have necessarily to deal with specific parcels of land in detail: as appears from their own Form 4 they have no difficulty in extracting from the rate-books the names of every occupier of property and its description, situation, extent and rateable value. If they desire information as to the ownership of any particular property they can inquire of the occupier of such land to whom he pays rent in respect of it, and if the answer shews only the name of an estate agent, further inquiry can be made from such agent. An army of officials to make such inquiries has been appointed by the Government at a cost to the country of between 300,000*l.* and 400,000*l.* a year. It is admitted that the officials usually fill up the particulars of the property, but it is said that, if they fail to

do the work for which they are paid by the public, other members of the public can be compelled to incur trouble and expense to supply their deficiencies. It would require very plain words in the Act to persuade me that the Legislature intended to impose such a corvée, and that too not upon the landowners who are taxed, but upon third persons who have nothing but an official or business connection with the land.

It is a novel and startling proposition that a Government department can call upon all the estate agents in the kingdom and require them to go through all their books in order to supply information which lies ready to the official's hand at the expenditure by them of a little trouble. I am therefore of opinion that the Attorney-General's contention is untenable, and that as the claim is persisted in the declaration made ought to stand. There is really no substance in the argument that the form is not a demand or threat; it is clearly both, and it is beside the mark to say that it is the Attorney-General and not the Commissioners who can sue for the penalty. The threat is that they will take such steps as they can to put the law in force to recover the penalty.

Two other points are raised, and as the Attorney-General (without prejudice to his objection in the House of Lords that it is inconvenient) thinks it would be convenient for the Commissioners to know our opinion on them, I will express mine.

The first is that the forms are required to be sent to a local official appointed by the Commissioners and not to the Commissioners themselves. I think that there is no substance in this objection. It cannot have been intended nor is it provided that all the forms should be returned to the Commissioners in London; and if they were, the Commissioners could at once redistribute them among their local agents, or the form could be required to be sent to the Commissioners, care of the local agent at his office or residence. On this point I am unable to agree with Warrington J.

The other point is this: the notice is dated August 25 and requires the plaintiff to return the form within thirty days after that day. But it was sent by post and was received by the plaintiff on the 26th. He had therefore only twenty-nine days

C. A. 1911

BURGHES v. ATTORNEY-GENERAL.

Farwell L.J.

in which to make the return. It is immaterial that it is only one day out of time. In *Dyson's Case* (1) it was five days, and the same considerations apply whether it be one day or twenty.

The Commissioners have no power to require any one to make returns to them except such as are given them by statute. The statute empowers them only to require returns within thirty days. A requisition to make a return within less than thirty days, whether it be twenty-nine or twenty, or one day, is not within the power and is therefore unauthorized, and the recipient is entitled to disregard it. The powers of the Commissioners cannot be enlarged by the carelessness or neglect of their subordinates or of themselves. If the form had run "within thirty days after receipt by you of this return," or if care had been taken to post or deliver in due time, the question would not have arisen.

As it is, the plaintiff has not been required to make a return in accordance with the Act, and the requisition is therefore a nullity.

This appeal should be dismissed.

Solicitors: *Solicitor of Inland Revenue; Wood & Sons.*

NOTE.—Finance (1909-10) Act, 1910, s. 26: "(1.) The Commissioners shall, as soon as may be after the passing of this Act, cause a valuation to be made of all land in the United Kingdom, showing separately the total value and the site value respectively of the land, and in the case of agricultural land the value of the land for agricultural purposes where that value is different from the site value. Each piece of land which is under separate occupation, and, if the owner so requires, any part of any land which is under separate occupation, shall be separately valued, and the value shall be estimated as on the thirtieth day of April nineteen hundred and nine.

"(2.) Any owner of land and any person receiving rent in respect of any land shall, on being required by notice from the Commissioners, furnish to the Commissioners a return containing such particulars as the Commissioners may require as to the rent received by him, and as to the ownership, tenure, area, character, and use of the land, and the consideration given on any previous sale or lease of the land, and any other matters which may properly be required for the purpose of the valuation of the land, and which it is in his power to give, and, if any owner of land or person receiving any rent in respect of the land is required by the Commissioners to make a return under

(1) Ante, p. 158.

this section, and fails to make such a return within the time, not being less than thirty days, specified in the notice requiring a return, he shall be liable to a penalty not exceeding fifty pounds to be recoverable in the High Court . . . . "

Sect. 31: "(1.) Every person who pays rent in respect of any land, and every person who as agent for another person receives any rent in respect of any land, shall, on being required by the Commissioners, furnish to them within thirty days the name and address of the person to whom he pays rent or on behalf of whom he receives rent, as the case may be."

"(3.) If any person wilfully fails to comply with the provisions of this section, he shall be liable to a penalty not exceeding fifty pounds to be recoverable in the High Court.

"(4.) Any notice requiring a return for the purpose of valuation, any copy of a provisional valuation, and any other notice or document which is required to be given or sent to an owner or a person interested in land under this Part of this Act by the Commissioners shall be sufficiently given or sent if sent by post to the address of the owner or person interested furnished to the Commissioners under the powers given by this section, or, if the address cannot be so ascertained, by leaving the notice or a copy of the document addressed to the owner or person interested with some occupier of the land, or, if there is no occupier, by causing it to be put up in some conspicuous place on the land."

R. M.

SUNDERLAND ORPHAN ASYLUM *v.* RIVER WEAR COMMISSIONERS.

[1911 S. 1056.]

Landlord and Tenant—Covenant—Breach of Lessee's Covenant—Right to Sue—Assignee of Reversion—Vesting by Private Act of Parliament—32 Hen. 8, *c.* 34.

In 1844 property was demised by the Freemen and Stallingers of Sunderland to the defendants' predecessors in title for a term of ninety-nine years, and the lease contained covenants by the lessees to keep the premises in repair and deliver them up at the end of the term. By a private Act of Parliament passed in 1853, which recited that the Freemen and Stallingers and other persons had claims on the property, it was provided that the premises should be and the same were thereby absolutely vested in the plaintiffs, free from all claims and incumbrances, but subject to the existing leases thereof. The defendants threatened to commit a breach of the covenants, and the plaintiffs brought this action for an injunction to restrain them from doing so. The defendants amongst other defences contended that the plaintiffs were not grantees or assignees of the reversion within 32 Hen. 8, c. 34, inasmuch as the

WARRINGTON J.

1911

SUNDERLAND ORPHAN ASYLUM v. RIVER WEAR COMMISSIONERS.

original lessors had not executed any grant or assignment to them, and that they could not sue on the covenants:—

Held, that the Act of 1853 must be treated as equivalent to a grant by the Freemen and Stallingers of Sunderland, the lessors under the lease of 1844, of the reversion expectant on that lease, and consequently that the plaintiffs came within 32 Hen. 8, c. 34, and could enforce the covenants.

THE plaintiffs in this case, the principal and governors of the Sunderland Orphan Asylum, were the owners of property at Sunderland, previously used as military barracks, and the defendants, the River Wear Commissioners, were the assignees of a lease of the property. The plaintiffs brought this action for an injunction to restrain the defendants from making certain alterations in the barracks. Amongst other defences the commissioners contended that the plaintiffs were not assignees of the reversion within the statute 32 Hen. 8, c. 34, and were therefore not entitled to sue them on the covenants contained in the lease. They admitted that they did propose to make the alterations.

The property in question consisted of a barrack yard containing ordinary barrack buildings and surrounded by a wall.

In the year 1844 the property was demised to the principal officers of Her Majesty's Ordnance by the Freemen and Stallingers of the Antient Borough of Sunderland. By that lease the lessors demised for a term of ninety-nine years from April, 1840, at a rent of 100*l*. "All that piece or parcel of ground as now enclosed situate in the Borough of Sunderland in the county of Durham together with the messuages and buildings thereon now used as Sunderland Barracks and in the occupation of Her Majesty's troops And also all that other piece or parcel of ground as now enclosed situate on the Sea Banks in the said Borough of Sunderland and used as a battery" . . . . "Together with all walls fences ways passages rights easements waters watercourses privileges and appurtenances whatsoever to the said pieces or parcels of ground and hereditaments expressed to be hereby demised belonging or in anywise appertaining or therewith usually held occupied or enjoyed." The lessees covenanted, among other things, that they would "at all times during the continuance of this demise . . . . well and sufficiently repair uphold amend support and keep the said messuages and

buildings and other the demised premises and every part thereof in by and with all manner of necessary reparations and amendments whatsoever when where and so often as the same shall be requisite during the said term and the said messuages and buildings being so well and sufficiently repaired amended and kept at the expiration or other sooner determination of the said term hereby granted will peaceably and quietly yield up unto the said Freemen and Stallingers their successors or assigns"; and there was a proviso for re-entry in the event of non-payment of rent or breaches of the covenant. That lease subsequently became vested in the Secretary of State for War and had been recently assigned by him to the River Wear Commissioners. The title to the reversion was as follows: By a private Act of Parliament of August 15, 1853 (16 & 17 Vict. c. 21, private), after reciting that the Freemen and Stallingers claimed to be entitled to the land in question and that the Bishop of Durham also claimed some title to it and that both parties were desirous of carrying into effect the provisions of the Act, it was provided, in s. 4, "That, from and immediately after the passing of this Act, the several pieces or parcels of land, messuages, tenements and hereditaments situated in the parish of Sunderland, and mentioned and set forth in the Schedules (A.) and (B.) to this Act annexed, with all and every the appurtenances to the same hereditaments and premises belonging, and the reversion and reversions, remainder and remainders, rents, issues and proceeds thereof, together with all seam and seams of coal, mines, and minerals whatsoever within and under the said premises, shall be and the same are hereby absolutely vested in the corporation" (i.e., the plaintiffs) "in fee simple, for the purposes of the said asylum, and for the purpose of providing for the spiritual wants of the parish of Sunderland as hereinafter mentioned, freed and absolutely discharged from all other existing uses or trusts to which the same are or may be subject, and from all existing claims and demands as aforesaid of the Bishop of Durham and of the Freemen and Stallingers of the Borough of Sunderland respectively, upon or in respect of the same, and from all incumbrances whatsoever, except an annuity or yearly

WARRINGTON J. 1911 SUNDERLAND ORPHAN ASYLUM v. RIVER WEAR COMMISSIONERS.

rent-charge of thirty-one pounds ten shillings hereinbefore mentioned, payable yearly to the rector for the time being of the rectory and parish church of Sunderland, but subject to the existing leases of the same hereditaments or any part thereof, and to the provisions in this Act contained."

Other contentions were raised by both parties, but the decisions on these points do not call for a report.

Gore-Browne, K.C., and *A. Adams*, for the plaintiffs. It is said that we are not assignees within 32 Hen. 8, c. 34, but we submit that we are protected by that statute by virtue of the private Act of Parliament of 1853. We stand in the position of the Freemen and Stallingers and are entitled to enforce the covenants. It is not essential that the hand which grants the lease should be the same as the hand which assigns the reversion. It is for the defendants to shew that we are not assignees, and there can be no doubt that the estate of the Freemen and Stallingers passed to us.

Cave, K.C., and *P. F. S. Stokes*, for the defendants. In the first place we contend that the plaintiffs have no right to sue us on the covenants contained in the lease, for they are not grantees or assignees of the reversion within 32 Hen. 8, c. 34. The private Act of 1853 was an enactment, not a grant. It did not purport to transfer any rights of action. It was not a conveyance by the Freemen and Stallingers and cannot operate in that way: Platt on Leases, vol. ii. pp. 393—395. To enable them to sue, the plaintiffs must be assignees of the reversion to which the covenants in our lease are annexed: *Cardwell* v. *Lucas* (1); *Webb* v. *Russell* (2); *Manchester Brewery Co.* v. *Coombs*. (3)

No reply was called for.

WARRINGTON J. It is said by the defendants that the plaintiffs are not, within the statute 32 Hen. 8, c. 34, entitled to sue on the covenants contained in this lease. The statute is very well known, and it provides by s. 1 that all "persons being grantees or assignees to or by our said Sovereign Lord the King, or to or

(1) (1836) 2 M. & W. 111, 122. (2) (1789) 3 T. R. 393.
(3) [1901] 2 Ch. 608, 613.

by any other person or persons than the King's Highness, and the heirs, executors, successors and assigns of every of them, shall and may have and enjoy like advantages against the lessees, their executors, administrators and assigns, by entry for non-payment of the rent, or for doing of waste or other forfeiture; and also shall and may have and enjoy all and every such like, and the same advantage, benefit and remedies by action only, for not performing of other conditions, covenants or agreements contained and expressed in the indentures of their said leases, demises or grants, against all and every the said lessees and farmers and grantees" as the lessors or grantors themselves would have had. Now it is said that the plaintiffs in this case are not persons who are grantees or assigns of the original lessor, and therefore they are not within the statute and under the old common law are not entitled to enforce the covenants in the lease. In my opinion that point is a bad one. I think the true effect of this private Act of Parliament is—especially having regard to the recital by which it appears that it was enacted in pursuance of the desire both of the Freemen and Stallingers and the Bishop to carry into effect the objects for which it was passed—that it must be treated as equivalent to a grant by the Freemen and Stallingers, the lessors under the lease of 1844, of the reversion expectant on that lease, and, that being so, the plaintiffs do come within the benefit of the statute of Henry VIII. and are entitled to enforce the covenants.

[His Lordship then considered the other points in the case and eventually dismissed the action with costs.]

Solicitors: *Bell, Brodrick & Gray, for F. J. McKenzie, Sunderland; Maude & Tunnicliffe, for Simey & Iliff, Sunderland.*

H. C. R.

NEVILLE J.

1911

Nov. 14.

In re BEAVAN.

DAVIES, BANKS & CO. *v.* BEAVAN.

[1908 B. 1743.]

Administration—Creditors—Testator of Unsound Mind—Bank Advances for Maintenance of Lunatic's Household—Bank Charges for Overdraft—Necessaries—Repairs—Rent Audits—Statute-barred Debt—Executors—Acknowledgment—Affidavit for Probate—Limitation Act, 1623 (21 *Jac.* 1, c. 16), *s.* 3.

A customer of a bank became of unsound mind. His son arranged with the bank to continue the lunatic's banking account and to draw upon it on behalf of the lunatic for the maintenance of the lunatic's household and for the necessary outgoings of his estate. At the death of the lunatic this banking account was overdrawn. In a creditors' action to administer the real and personal estate of the lunatic the bank claimed to prove as creditors for the amount of the overdraft, which included usual bank charges for interest and commission:—

Held, that although the bank were not creditors of the lunatic they were entitled under the doctrine of subrogation to stand in the shoes of creditors paid by the son by means of the banking account for necessaries supplied for the maintenance of the lunatic's household, and for the necessary outgoings of his estate.

But *held*, that the bank were not entitled to prove for interest and commission on the overdraft.

In a proper case necessaries may include interest on mortgages, repairs, insurance, and rent audit expenses.

An executor's affidavit for probate which includes, in the list of the testator's debts, a statute-barred debt of the testator does not operate as an acknowledgment so as to take the debt out of the Statute of Limitations.

Stamford, Spalding and Boston Banking Co. v. *Smith* [1892] 1 Q. B. 765, followed.

Smith v. *Poole* (1841) 12 Sim. 17, is no longer law.

In re Emmett (1906) 95 L. T. 755, questioned.

For many years prior to February 15, 1904, the testator J. G. Beavan had a current account, which was at times overdrawn, with the plaintiffs, Davies, Banks & Co., who were bankers at Kingston in the county of Hereford. On that date he had a paralytic seizure which rendered him wholly incapable both physically and mentally of managing his affairs. He continued in that state until his death on November 13, 1906. His will, made prior to his seizure, appointed his four sons, Samuel, Francis,

Thomas, and Charles, his executors, and three of them proved the will.

The testator was possessed of considerable real estates in the counties of Radnor, Hereford, and Devon, which were heavily mortgaged. He had also a small sum of Consols. His household at the time of his seizure consisted of himself, his wife, four grown-up daughters, his eldest son Samuel, and servants. Samuel assisted his father in the management of his affairs and in collecting the rents of the real estates, and attended the rent audits on behalf of his father. The bank were informed of the testator's illness, and at that date his current account with them was overdrawn about 53*l.*, and Samuel, with the approval of the other members of the family, arranged with the bank for the continuance of the account, and that he should be permitted to draw upon it by cheques signed "for J. G. Beavan, S. S. Beavan." The account was accordingly continued, the rents of the estates and other income being paid into it in the usual way, and Samuel operated upon the account and applied the moneys in the upkeep of the testator's household establishment, which was maintained on the same footing as before, and in paying other necessary outgoings of the estate, such as interest on mortgages, insurance, rates and taxes. This account at the testator's death was overdrawn, and included usual bank charges for interest and commission on the overdraft.

For some years prior to his illness the testator had another account with the bank, called No. 2 account, which was opened for the purpose of paying off a mortgage and was closed in 1902. This No. 2 account was reopened in 1904 by Samuel in the name and on behalf of his father for the purpose of providing funds for the necessary repairs to one of the testator's properties in Devonshire, known as "Trevernen." This property was unlet and required substantial repairs, and the account was opened with an overdraft of 500*l.* secured by a collateral charge given by Samuel on his own property. By this means "Trevernen" was repaired and well let, and the rents were paid into No. 2 account. Samuel operated on this account by cheques signed as above stated and applied the money in paying the mortgage interest and other necessary outgoings in connection with the

NEVILLE J. property, and at the date of the testator's death this account also stood overdrawn and included usual bank charges for interest and commission on the overdraft.

1911

BEAVAN, *In re.* DAVIES, BANKS & Co. *v.* BEAVAN.

In April, 1908, the bank commenced the usual creditors' action against the four executors for the administration of the testator's real and personal estate, and obtained judgment on November 21, 1908, when the usual accounts and inquiries were directed. Under the inquiry as to debts the bank carried in a claim for 1248*l.* 16*s.* 10*d.* on the current account and 517*l.* 4*s.* 7*d.* on No. 2 account, which were the amounts due at the date of the judgment, and included in each case usual bank charges for interest and commission on the overdraft.

The testator's widow also carried in a claim for money lent. Both claims were adjourned into Court.

The defendants Samuel and Charles Beavan, being of opinion that the claims ought not to be resisted, severed from their co-defendants and did not appear on the present applications.

Peterson, K.C., and *F. Thompson*, for the plaintiffs. In the case of necessaries supplied to a lunatic the law will raise a contract by implication on the part of the lunatic under which the amount of such necessaries may become payable as a debt out of his estate: *Williams* v. *Wentworth* (1); *Wentworth* v. *Tubb* (2); *In re Rhodes* (3); and under the doctrine of subrogation a person who lends money to another who supplies the necessaries to a lunatic is entitled to stand in the shoes of the person who provides such necessaries: *Harris* v. *Lee* (4); *Jenner* v. *Morris* (5); *In re Wood's Estate.* (6) The bank, therefore, are entitled to stand in the shoes of the creditors who were paid out of the banking account for necessaries supplied for the maintenance of the testator's household. What are necessaries must depend upon the circumstances in each case and the position in life of the lunatic. Here it was necessary to maintain the personal household of the lunatic and also to pay the necessary outgoings of the estates. If the mortgage interest and insurance and the

(1) (1842) 5 Beav. 325.
(2) (1841) 1 Y. & C. Ch. 171.
(3) (1890) 44 Ch. D. 94.
(4) (1718) 1 P. Wms. 482.
(5) (1861) 3 D. F. & J. 45.
(6) (1863) 1 D. J. & S. 465

rates and taxes were not paid, their payment would have been enforced by legal proceedings. In many instances the payments were made direct by cheques drawn on the account by Samuel, and in other cases Samuel drew out money and applied it in such payments. Another item in the account is the charge of 10*l.* yearly for the expenses of the rent audit dinners. Such expenditure is customary, and Samuel attended the rent audits during the lunacy in the same way as in his father's previous lifetime.

[NEVILLE J. I think that would be a proper expenditure so long as the money was expended by Samuel for the rent audits and not in remuneration to himself.]

Then with respect to account No. 2, "Trevernen" required extensive repairs, and was by means of the overdraft put into a substantial state of repair, and in consequence was soon well let, and the rent has been paid into the account. It is submitted that the outlay was necessary for the protection of the estate. Lastly, there is the question whether the plaintiffs are entitled to be paid out of the estate usual bank charges for their advances. It is submitted that the interest and commission are themselves necessaries, because they were incurred for the protection of the estate and prevented creditors from suing for their accounts.

[NEVILLE J. I do not see how the expenses incurred in borrowing the money can be brought in against the lunatic's estate under the doctrine of subrogation.]

It is submitted that if the only person who will lend the money is a bank or a person who requires to be paid interest, then the interest is part of the necessaries.

Jenkins, K.C., and *Owen Thompson*, for the defendants Francis and Thomas Beavan. The estate being insolvent, the executors are bound to protect it for the benefit of other creditors. The general rule that a person who supplies necessaries for the maintenance of a lunatic is entitled to be paid out of the lunatic's estate is not disputed, but this is the case of a bank financing a lunatic. As between the son Samuel and the bank, it is Samuel who is liable for the advances, and the bank has no right to stand in his shoes for necessaries supplied by him. There is no direct authority that a person who voluntarily takes upon himself

NEVILLE J. 1911 BEAVAN, *In re.* DAVIES, BANKS & Co. *v.* BEAVAN.

the support of a lunatic can by borrowing money for that purpose give the lender a right of proof for the loan against the lunatic's estate. *Harris* v. *Lee* (1), *Jenner* v. *Morris* (2), and *In re Wood's Estate* (3) are distinguishable from the present case. In each of them the necessaries were supplied to the wife of the lunatic, and the wife, as pointed out in *Jenner* v. *Morris* (2), has an "uncountermandable authority to order the necessaries on his credit." Here Samuel was not the agent of the lunatic to borrow money of the bank for necessaries. It is not a case of subrogation at all. But if the doctrine applies, the question is what items in the accounts are necessaries? It is submitted that only such payments are necessaries as were reasonably necessary for the maintenance of the testator and his wife and for the protection of his estate, and should not extend to the support of his grown-up daughter and son. There is no obligation in equity to support sons and daughters after twenty-one years of age, and the poor law obligation to maintain children does not extend beyond sixteen years of age. We do not object to payment for the necessary outgoings of the estate and for the reasonable expenses of rent audits.

Peterson, K.C., in reply.

[NEVILLE J. I feel some difficulty about the adult children.]

On the evidence the daughters have always lived with their father and have been supported by him, and Samuel also lived with him and assisted in the management of the estates. It is reasonable that on the testator's illness his personal establishment should be maintained on the same footing as before, and that his daughters should continue to be supported and clothed by him. If Samuel had not continued to reside with him, he would have been entitled to an allowance for managing the estates.

NEVILLE J. The circumstances of this case are these. The testator was living with four adult daughters and a son in a house which he occupied until his death. In the year 1904 he was rendered incapable of managing his affairs as a result of a stroke

(1) 1 P. Wms. 482. (2) 3 D. F. & J. 45, 51.
(3) 1 D. J. & S. 465.

of paralysis, and he died on November 13, 1906. For many years he had kept an account with the plaintiff bank, into which all his income had been paid, which was mainly derived from the rents of certain real estates that he held, and he had drawn upon that account, which was from time to time overdrawn, the payments in going to the reduction of the overdraft when the audits took place and the rents were paid. Upon the occurrence of the illness which rendered him incapable, his eldest son applied to the bank to continue the account and the overdraft, and this they consented to do, and from that time until his death the family of the testator and the testator himself were maintained by money provided in that sense by the bank; an overdraft being allowed, and the rents continuing to be paid in. Now the estate has proved to be insolvent, and the question is how far the claim by the bank against the testator's estate for the amount of their account can be justified. I ought to add that there is another account, called No. 2 account, opened by the son in respect of a loan of 500*l.* which was applied for the purpose of the repairs to one of the estates; and that is included in the claim of the bank.

It has been argued that the bank are not entitled to claim against the estate at all, but can only look to Samuel Beavan, who is the person with whom they agreed to continue the account; and I have to consider how far the bank are entitled to claim against the estate. The matter is one which must, in the view I take, result in an account, and it is quite obvious that I cannot take the account in Court. Now it is not disputed that the law is that a person maintaining another of unsound mind is entitled to recoupment from his estate in respect of necessary expenditure, having regard to the position in life of the person of unsound mind. Starting with that, the question is, what is the right of one who lends money to the person who is maintaining the lunatic where that money is applied in the provision of necessaries for the maintenance of the lunatic? It appears to me that no legal right arises as a result of the lending in favour of the lender, but I think an equity arises, and that that equity is to stand in the shoes of those creditors who, being creditors for necessaries supplied for the maintenance of the lunatic, have

NEVILLE J. 1911 BEAVAN, *In re.* DAVIES, BANKS & Co. *v.* BEAVAN.

been paid out of the money advanced by the lender. That is an equity which applies in many cases, and I think that it also applies in the present case. Then it was argued that, in addition to that, there was a right on the part of the bank to recover the charges for interest and commission which, had they been dealing with a person of sound mind, they would have been entitled to charge. It does not seem to me that that contention can prevail. I think that, inasmuch as the equity which is to be applied is merely the right to stand in the shoes of the creditors who are paid off, it is impossible that in addition to that there should be a right to receive the charges which have been paid for obtaining the loan. But suppose an interest-bearing debt had been paid off with the money of the lender, then I think that the lender, having a right to stand in the shoes of the creditor, would have the right to stand in his shoes with regard to interest as well as principal; but where the debt is not interest-bearing I think the claim of the lender can only be admitted to the extent to which his money has been applied in discharging the claim of the creditor. I hold, therefore, that the claim of the bank, with these points decided, must go to the Master, and I think that the account should be how far the money provided by the bank was expended in payment of necessaries for the testator's household and family, having regard to his position in life, and in the protection of his estates.

Mrs. Beavan's Claim.

On April 19, 1895, Mrs. Beavan lent her husband, the testator, the sum of 574*l.* at interest at 4 per cent., and he gave her his I. O. U. The money was paid into his banking account with the plaintiffs, which was then overdrawn and was thereby placed in credit. No interest was paid, and on January 2, 1900, the testator gave Mrs. Beavan his written admission that the 574*l.* was due to her together with interest from April 19, 1895. No interest was paid by the testator prior to his illness in February, 1904, and on December 29, 1905, the sons Samuel and Charles Beavan, who knew that they were two of the executors named in the testator's will, gave Mrs. Beavan a memorandum whereby they agreed not

to plead the Statute of Limitations against the I. O. U., and during the year 1906 three quarterly payments of interest on the 574*l.* were paid Mrs. Beavan by the son Samuel, who at that time was managing the testator's affairs as previously stated, by three separate cheques signed "for J. G. Beavan, S. S. Beavan," and drawn on the testator's current account with the plaintiffs. In March, 1907, after the testator's death, his executors entered, in the list of the testator's debts scheduled to their affidavit for probate, the 574*l.* with interest to date, making together 811*l.* 9*s.* 7*d.* Under the inquiry as to debts in the administration judgment Mrs. Beavan carried in a claim for the 811*l.* 9*s.* 7*d.*, and her claim was adjourned into Court.

Dighton Pollock, for Mrs. Beavan. It is submitted that the same principle applies to Mrs. Beavan's claim as to that of the bank. The payment of the interest was necessary for the protection of the lunatic's estate and was made by the son who was managing the testator's affairs at the time. Moreover, but for the memorandum of December, 1905, Mrs. Beavan would have brought an action for her debt, and there could have been no answer to her demand. Secondly, the inclusion of the debt by the executors in the list of the testator's debts scheduled to their affidavit for probate was a sufficient acknowledgment. *Smith* v. *Poole* (1) is a direct authority in favour of the claim, and was followed by Kekewich J. in the case of *In re Emmett.* (2) In *Edwards* v. *Janes* (3) a verbal admission made to the solicitor who prepared the affidavit for probate was held sufficient. Evidence can be obtained that in this case the affidavit was sent to the son Charles, who was at the time acting as solicitor for Mrs. Beavan.

Peterson, K.C., and *F. Thompson*, for creditors generally. The sons were not the agents of the lunatic to make any promise or any payment of interest. In the next place, the decisions in *Smith* v. *Poole* (1) and *Edwards* v. *Janes* (3) were at a time when it was thought that any acknowledgment was sufficient, but it is now settled that the acknowledgment must be to the

(1) 12 Sim. 17. (2) 95 L. T. 755.
(3) (1855) 1 K. & J. 534.

NEVILLE J. 1911 BEAVAN, *In re.* DAVIES, BANKS & CO. *v.* BEAVAN.

creditor or his agent: Darby and Bosanquet's Statutes of Limitations, 2nd ed. p. 95; *Grenfell* v. *Girdlestone* (1); *Godwin* v. *Culley* (2); *Howcutt* v. *Bonser* (3); *Davies* v. *Edwards* (4); *Fuller* v. *Redman.* (5) In *Stamford, Spalding and Boston Banking Co.* v. *Smith* (6) Lord Herschell says: "But it was argued that if an acknowledgment is in fact made, it is immaterial to whom it is made. Such appears to have been considered the law at one time, and there are certainly some dicta to that effect; but that is not the law now. In my opinion, since the decision in *Tanner* v. *Smart* (7) it has been abundantly settled that an acknowledgment to a stranger is not sufficient. It must be to the creditor or his agent." It is submitted that *Smith* v. *Poole* (8) is no longer law and that *Edwards* v. *Janes* (9) is of doubtful authority. *In re Emmett* (10) is distinguishable. There the debtor was one of the executors who made the affidavit, and that might amount to an admission of the debt by him to his co-executors. As to the suggested further evidence, even if the affidavit was sent to Charles as the agent of Mrs. Beavan, that is not sufficient. He was also one of the executors.

Dighton Pollock in reply. The facts in *Stamford, Spalding and Boston Banking Co.* v. *Smith* (6) were very different to those in the present case, and *Smith* v. *Poole* (8) was not cited.

NEVILLE J. I think it is quite impossible to hold that an agreement not to plead the statute or an acknowledgment given by a person who undertakes the management of the property of a person of unsound mind can operate to prevent the Statute of Limitations running in favour of the person of unsound mind, because clearly there is no agency and no capacity on the part of the manager to act for the person of unsound mind at all. Therefore, until we get to the date of the death of the testator, it seems to me nothing could happen in this case to prevent the Statute of Limitations from continuing to run.

(1) (1837) 2 Y. & C. Ex. 662, 676.
(2) (1859) 4 H. & N. 373.
(3) (1849) 3 Ex. 491.
(4) (1851) 7 Ex. 22.
(5) (1859) 26 Beav. 614.
(6) [1892] 1 Q. B. 765, 768.
(7) (1827) 6 B. & C. 603.
(8) 12 Sim. 17.
(9) 1 K. & J. 534.
(10) 95 L. T. 755.

Then the only question is whether after the death of the testator the executors have acknowledged the debt so as to give Mrs. Beavan a right to make a claim for the money in the action, and that really depends upon whether I can treat *Smith* v. *Poole* (1) still as law. That case is as near as may be a direct authority that an acknowledgment of this kind is a sufficient acknowledgment within the statute. The question is, is that the law now? I think after what has been said in many cases, notably by Lord Herschell in *Stamford, Spalding and Boston Banking Co.* v. *Smith* (2), where he lays down in the clearest possible way that the acknowledgment must be to the creditor or his agent, that it is impossible to say that *Smith* v. *Poole* (1) is any longer law, and that it would be wrong for me to follow it, because, although it is a decision of a Court of co-ordinate jurisdiction, there have been other decisions since which in principle are totally opposed to that decision. In the case of *In re Emmett* (3) Kekewich J. held that where the judgment debtor was one of the executors, and joined the others in making the affidavit which included the debt due from him, that did amount to an acknowledgment. I am not prepared to say that I think that decision is consistent with the law as laid down in *Stamford, Spalding and Boston Banking Co.* v. *Smith.* (2) It may be distinguishable from the case I have before me, and therefore all I hold now is that I am not bound by and cannot follow the decision in *Smith* v. *Poole* (1), but must apply the principle laid down by Lord Herschell. I cannot, therefore, hold this affidavit to be an acknowledgment of the debt, inasmuch as it was not made to the creditor. It has been suggested that evidence might be forthcoming that the affidavit was communicated to Mrs. Beavan or to her son Charles as her agent. I think it would be unfortunate to admit such evidence at this stage of the argument. I may add that I do not think it would make the slightest difference if it were shewn that the affidavit came to the knowledge of the creditor, or if he was consulted as to the amount of the debt due. The real question is, to whom was the acknowledgment

(1) 12 Sim. 17.
(2) [1892] 1 Q. B. 765, 768.
(3) 95 L. T. 755.

NEVILLE J. 1911 BEAVAN, *In re.* DAVIES, BANKS & CO. *v.* BEAVAN.

made? I think it is clear that the acknowledgment was made to the Court, and not to anybody else. I hold, therefore, that the claim fails.

Solicitors for plaintiffs: *Field, Roscoe & Co., for E. P. & A. L. Careless, Llandrindod Wells.*

Solicitors for other parties: *A. B. Chubb & Pettitt, for Andrews, Barrett & Wilkinson, Weymouth.*

H. L. F.

C. A. 1911 *Nov.* 9, 10; *Dec.* 9.

GREAT CENTRAL RAILWAY COMPANY *v.* MIDLAND RAILWAY COMPANY.

[1908 G. 2076.]

Railway Company—Running Powers over another Line—General Traffic—Junction by Third Company for Limited Traffic—Amalgamation of Running Company with Junction Railway—Effect of Amalgamation—Railways Clauses Act, 1863 (26 *&* 27 *Vict. c.* 92), *ss.* 38, 39, 41, 55.

Under a special Act of 1865 the Great Central Railway Company obtained general running powers over the Midland Railway Company's line from M. to W. In 1897 the Derbyshire Railway Company, whose line crossed the Midland Company's said line at S., constructed under the powers of another special Act a short line (called the S. curve) and a junction connecting their line with the Midland line at S., and, under an agreement with the Midland Company, acquired limited running powers over so much of the Midland line as lay between the junction and a colliery on the Midland line for coal traffic to and from the colliery by way of the S. curve and junction.

In 1906 the Great Central Company and the Derbyshire Company were amalgamated under a special Act which incorporated the Railways Clauses Consolidation Act, 1845, and the amalgamation provisions of the Railways Clauses Act, 1863, and the Derbyshire Company was dissolved. The Great Central Company then claimed that, as owners of the Derbyshire Company's undertaking, they were entitled to bring general traffic over the S. curve and junction and then, by virtue of their general running powers under the Act of 1865, to pass such traffic over the Midland line to and from M.:—

Held by the Court of Appeal, reversing the decision of Neville J. [1911] 2 Ch. 173, that the effect of the amalgamation was to give to the Great Central Company no greater rights over the Midland line than were possessed and enjoyed by the Derbyshire Company before the amalgamation; and that after the amalgamation the Great Central Company was entitled to enjoy the statutory powers of user given by s. 92 of the Railways Clauses Consolidation Act, 1845, only to the same

extent and subject to the same conditions as the Derbyshire Company had enjoyed them.

Midland Ry. Co. v. *Great Western Ry. Co.* (1873) L. R. 8 Ch. 841, distinguished.

APPEAL from a decision of Neville J. (1) The facts will be found fully stated by reference to a plan in the report in the Court below. They may be shortly stated as follows.

By the Midland Railway (Mansfield, &c., Lines) Act, 1865, s. 29, the Manchester, Sheffield and Lincolnshire Railway Company, the predecessors of the plaintiff company, were given general running powers over the line of the defendant company between Shireoaks on the north and Mansfield on the south. By a special Act, passed in 1897, the Manchester, Sheffield and Lincolnshire Railway Company was renamed the Great Central Railway Company, and became the plaintiff company with its attendant rights and privileges, including the rights and powers conferred by s. 29 of the Act of 1865. By the Lancashire, Derbyshire and East Coast Railway Act, 1891, the Lancashire, Derbyshire and East Coast Railway Company (hereafter called the Derbyshire Company) were authorized to construct and did construct a short line, known as the Shirebrook curve, and to form a junction, called Shirebrook Junction, with the defendant company's line between Shireoaks and Mansfield; and by s. 26 of the Act were empowered to enter into agreements with the defendant company with respect to certain purposes, including "The working or use management and maintenance of the railway or railways of the Derbyshire Company or of any part thereof. The management regulation interchange collection transmission and delivery of traffic upon or coming from or destined for the railways of the contracting companies." By an agreement made in the year 1898 between the defendant company and the Derbyshire Company the latter were given running powers over the defendant company's line between Shirebrook Junction and the Shirebrook Colliery, which was situated a short distance to the south of the junction, subject to a toll of 3*d.* a ton (reduced to 2*d.* a ton by a subsequent agreement in 1902). The Shirebrook Junction was used in connection with these running powers and

(1) [1911] 2 Ch. 173.

C. A. 1911

GREAT CENTRAL RAILWAY v. MIDLAND RAILWAY.

also for the interchange of traffic between the Derbyshire Company and the defendant company.

By the Great Central and Derbyshire Railways Act, 1906, which incorporated, amongst others, the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), and Part V. (relating to amalgamation) of the Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), the whole undertaking of the Derbyshire Company was transferred to and vested in the plaintiff company, and the Derbyshire Company was dissolved. By clause 4 of an agreement scheduled to the Act of 1906 provision was made for the payment to the defendant company of the toll of 2*d.* per ton in respect of the colliery traffic above mentioned. The Act of 1906 did not refer to the running powers of either of the amalgamating companies over the defendant company's line.

Shortly after the passing of the Act of 1906 the plaintiff company adopted the route via Shirebrook Junction for general traffic to and from places on the defendant company's Shireoaks and Mansfield line, and for that purpose ran off and on the defendant company's said line at Shirebrook Junction, and passed over and used with the plaintiff company's engines, carriages, and trucks the defendant company's said line. The defendant company objected and contended that the running powers of the plaintiff company over the defendant company's line via the Shirebrook Junction were limited to those previously possessed by the Derbyshire Company, namely, running powers in respect of the traffic to and from the Shirebrook Colliery. Thereupon the plaintiff company brought this action for a declaration that they were entitled to exercise running powers for all their traffic over the defendant company's Shireoaks and Mansfield line and over any part thereof, and for that purpose to run on and off the said line by way of the Shirebrook Junction.

Neville J. made the declaration asked for.

The defendant company appealed. The appeal came on for hearing on November 9, 1911.

Upjohn, K.C., and *Sargant*, for the appellants. The contention of the respondents is this, that being now the owners of the Shirebrook curve and thus having a physical junction with the

appellants' line they are entitled to use the running powers over the Midland line, which they possess under the Act of 1865, in respect of any traffic which they may bring on to the appellants' line from the Derbyshire line. That is contrary to the effect of the amalgamation sections of the Act of 1863. The effect of ss. 38, 39, 41, and 55 of the Act of 1863 is that the powers and authorities of the dissolved company, subject to the obligations of that company, become vested in the amalgamated company, and are to be held, used, exercised, and enjoyed by the amalgamated company in the same manner and to the same extent as the same were at the time of amalgamation. We submit that the respondents are not entitled to bring upon the appellants' line via the Shirebrook curve and junction any traffic which the Derbyshire Company before the amalgamation could not have carried by that route. Neville J. decided the case upon an application of the principle of *Midland Ry. Co.* v. *Great Western Ry. Co.* (1), but that case is distinguishable. The running powers there were general, and there was no question of amalgamation.

[COZENS-HARDY M.R. Is not the whole question whether the burden of the easement is increased by virtue of the amalgamation?]

Yes.

C. A. Russell, K.C., Jenkins, K.C., and *W. H. Cozens-Hardy*, for the respondents. This case is really governed by the principle of the decision in *Midland Ry. Co.* v. *Great Western Ry. Co.* (1) The Shirebrook curve was part of the Derbyshire Company's line and they had complete control over it up to their boundary and could have given running powers over it to the Great Central down to the point where it joins the Midland line. According to the judgment of James L.J. in *Midland Ry. Co.* v. *Great Western Ry. Co.* (1) the effect in law of the right to make the Shirebrook Junction was to make the two lines, the Derbyshire line and the Midland line, one continuous line of railway. If the respondents are entitled by virtue of the amalgamation to use the Shirebrook curve and are entitled by virtue of the Act of 1865 to use the appellants' line, it would, as Mellish L.J. puts it in the same case (2), be "a very

(1) L. R. 8 Ch. 841. (2) L. R. 8 Ch. 855.

C. A. 1911

GREAT CENTRAL RAILWAY v. MIDLAND RAILWAY.

extraordinary conclusion to hold that they are not entitled to go from one to the other."

Dealing with the case apart from the amalgamation, the notion of a right of access does not exist for this purpose. The respondents are relying upon the easement which they have over the Midland line.

[FLETCHER MOULTON L.J. They have no right of entry apart from s. 92 of the Railways Clauses Consolidation Act, 1845.]

Sect. 29 of the Act of 1865, which gives them their running powers, is silent upon the question as to at what point or points they can come on to the Midland line. Save that the running powers in *Midland Ry. Co.* v. *Great Western Ry. Co.* (1) were acquired by agreement and not under an Act the two cases are much the same.

[FLETCHER MOULTON L.J. There was a right of user in that case which does not exist here.

COZENS-HARDY M.R. The respondents in this case have no greater powers than are given by the general Act which is incorporated in the amalgamation Act.]

There is nothing in the amalgamation Act to cut down the rights which the respondents have by virtue of the Act of 1865. By virtue of the amalgamation Act they obtained the powers which the Derbyshire Company previously possessed, and there is nothing to prevent the respondents from linking up those powers with their running powers under the Act of 1865. They have the right to run on either side of the point of junction, and then, given physical communication, the two rights coalesce.

Sect. 92 of the Act of 1845 deals with the right of user and not the right of entry. The right to pass over follows from the right of user.

Both on principle and authority the respondents, being lawfully at the point of junction with traffic authorized by the running powers given in s. 29 of the Act of 1865, are entitled to pass over the junction and use the Midland line for the purpose of carrying that traffic.

Upjohn, K.C., in reply. *Midland Ry. Co.* v. *Great Western Ry. Co.* (1) does not apply, because there the Midland

(1) L. R. 8 Ch. 841.

Company had perfectly general running powers and powers of user over whole sections of the Great Western Railway, so that the point upon which the appellants rely did not arise there. The point here is whether having regard to the amalgamation the respondents are entitled to use the running powers which the Derbyshire Company had not, but which the respondents claim to have aliunde. The Derbyshire Company had only very restricted running powers, and it cannot be maintained, consistently with s. 38 of the amalgamation Act, that the appellants are to be subjected to an increased burden.

Cur. adv. vult.

Dec. 9. COZENS-HARDY M.R. read the following judgment of Fletcher Moulton L.J., with which he said he agreed, and to which he did not desire to add anything.

FLETCHER MOULTON L.J. In this case the plaintiffs, the Great Central Railway Company, sue for a declaration that they are entitled to exercise running powers for all their traffic over the Mansfield and Worksop line of the defendant company and for that purpose to run on and off the said line by way of Shirebrook Junction. They base their claim on s. 29 of the Midland Railway (Mansfield, &c., Lines) Act, 1865, which gave to the Manchester, Sheffield and Lincolnshire Railway Company running powers over that branch of the Midland line. The Manchester, Sheffield and Lincolnshire Railway Company subsequently changed its name to the Great Central Railway Company. The question may arise as to the extent of the running powers granted by the above section, but it is immaterial in my view of the rights of the parties and it was not argued before this Court—the defendants, however, reserving their right to raise it should it be found necessary.

The real contest between the parties relates to the last portion of the injunction claimed by the plaintiff company, namely, their right to run on and off the line of the Midland Railway Company at Shirebrook Junction. That junction was constructed by the Lancashire, Derbyshire and East Coast Railway Company under the powers granted to them by their Act of 1897 and in order to

C. A. 1911 — GREAT CENTRAL RAILWAY v. MIDLAND RAILWAY. — Fletcher Moulton L.J.

link their line up with the Mansfield and Worksop line of the Midland Railway Company. That Act, however, though prescribing elaborately the conditions under which the junction should be made, gave to the Lancashire, Derbyshire and East Coast Railway Company no running powers on to or over the Midland line, but by s. 26 it gave to the two companies power to enter into agreements for a variety of purposes (including the interchange of traffic), such powers being amply sufficient to cover arrangements as to running powers. Under these powers the two companies made an agreement, dated December 1, 1897, with regard to such running powers, and it provided that the Lancashire, Derbyshire and East Coast Railway Company might run over and use for goods traffic only the Midland Company's Mansfield line from Shirebrook Junction to a proposed junction at Mansfield. This agreement was modified by one made between the same parties on February 1, 1898, which permitted the Lancashire, Derbyshire and East Coast Railway without prejudice to the running powers already given by the former agreement to run between the Shirebrook Junction and the Shirebrook Colliery for the purpose of traffic to and from that colliery at a fixed toll of 3*d.* per ton. These limited running powers were all that were possessed by the Lancashire, Derbyshire and East Coast Railway Company at any time material to the questions in this action, so that only goods traffic and traffic going to the proposed junction at Mansfield of the Shirebrook Colliery could pass from that railway on to the Midland Railway through the Shirebrook Junction.

In the year 1906 the Great Central Company obtained an Act for the amalgamation of the railways and undertaking of the Lancashire, Derbyshire and East Coast with their own undertaking. This Act incorporated Part V. of the Railways Clauses Act, 1863. The amalgamation was carried out in the second of the two forms referred to in s. 37 of the Railways Clauses Act, 1863, inasmuch as the Lancashire, Derbyshire and East Coast Railway was dissolved and its undertaking was transferred to the plaintiff company without any change of name in the latter.

The undertaking of a railway may change gradually by the

construction of new lines, works, &c., without in any way affecting the identity of the railway company. But this is not the present case. Here we have a case of the union of the undertakings of the two railways by amalgamation. This can only be done by statute, and the effect of such union is laid down carefully in Part V. of the Railways Clauses Act, 1863, which the Legislature usually requires should be incorporated in every Act authorizing an amalgamation in order that the general results of such a union may be uniform. The resulting company is an entity differing from either of the two component companies, and its rights must be deduced from the rights of those component companies according to the provisions of Part V. of the Railways Clauses Act, 1863.

A perusal of the clauses that form Part V. of the Railways Clauses Act, 1863, shews that the terms upon which amalgamation is permitted are based on the principle that third parties shall not lose any rights or privileges thereby, but that on the other hand the rights and privileges of the component companies so far as they affect third parties shall be preserved. This is obviously fair and just. The fundamental section is 38, which reads as follows: "In every case of amalgamation, the undertaking, railways, harbours, navigations, ferries, wharfs, canals, works, real and personal property, powers, authorities, privileges, exemptions, rights of action and suit, and all other the rights and interests of the dissolved company, shall, subject to the contracts, obligations, debts, and liabilities of that company, become at the time of amalgamation, and by virtue of the amalgamating Act, vested in the amalgamated company, and may and shall be held, used, exercised, and enjoyed by the amalgamated company in the same manner and to the same extent as the same respectively at the time of amalgamation are, or if the amalgamating Act were not passed might be, held, used, exercised, and enjoyed by the dissolved company"; and if two railways avail themselves of a statutory amalgamation they must be content that the rights and privileges of the component railways shall be enjoyed by the amalgamated company "in the same manner and to the same extent as the same respectively at the time of the amalgamation" were enjoyed by the dissolved company.

C. A. 1911 — GREAT CENTRAL RAILWAY v. MIDLAND RAILWAY. — Fletcher Moulton L.J.

The application of this section to the facts of the present case is very simple. At the date of the amalgamation the dissolved railway had only the limited rights of passage on to the Midland line which I have above described, namely, a right for goods traffic only, and that only to the proposed junction at Mansfield and to the Shirebrook Colliery. To traffic other than this the Midland Company could close their junction at Shirebrook and could refuse to permit it to enter or leave. It is true that theoretically the statutory powers of user existed which are given by s. 92 of the Railways Clauses Consolidation Act, 1845, but it is admitted that these have nothing to do with the questions in the present case. After the amalgamation the amalgamated company is entitled to enjoy these privileges only to the same extent and subject to the same conditions as the dissolved company enjoyed them. Any other decision would work great injustice. The junction with the Midland line at Shirebrook had been permitted on terms which left the user to be settled by arrangement, and the arrangement had been made between the two companies and the rights of user of the junction fixed thereby. In accepting amalgamation the amalgamated company accepted the terms that the rights of user of the junction should not be increased. I can imagine no more serious interference with the rights of the Midland Railway Company, which is a third party not concerned in the amalgamation, than to extend the rights of user of the junction to all kinds of traffic running all over the Midland lines as the plaintiffs claim that the Court should declare to be their right.

The language of the clauses as to amalgamation is so clear that counsel for the plaintiffs scarcely attempted to deal with it. Substantially the whole of their argument amounted to saying that this Court was bound by the decision of the Lords Justices in the case of *Midland Ry. Co.* v. *Great Western Ry. Co.* (1) I think there are fundamental differences between the facts of that case and the present, but it is not necessary to examine the facts closely because there is the all-important difference in point of law that there was no amalgamation in that case, and the Court had not there to consider the effect of those statutable provisions on which the present case entirely turns.

(1) L. R. 8 Ch. 841.

In that case the plaintiff company had running powers up to and on the line of the defendant company and it relied upon those running powers entirely. In the present case the Great Central Railway had at the date of the amalgamation no running powers over the Lancashire, Derbyshire and East Coast Railway and might never have obtained any. It obtained, of course, the right to pass its traffic over the line of the dissolved company by amalgamation, but this could not give it any powers of passing that traffic on to the Midland line. Its powers of so doing were by the conditions of amalgamation no greater than those that existed for the traffic of the Lancashire, Derbyshire and East Coast Railway at the date of the amalgamation.

For these reasons I am of opinion that the appeal must be allowed and the action dismissed with costs.

FARWELL L.J. Under and by virtue of the Midland Railway Act, 1865, the plaintiffs had and still have the right to pass over and use with their engines, carriages, and servants and for the purposes of traffic of all kinds that part of the Midland Railway that lies between Shireoaks Junction and Mansfield. In or about 1897, the Derbyshire Company obtained certain limited powers to make a junction with the Midland line between Shireoaks and Mansfield and to use portions of that line for certain limited purposes. By an Act in 1906 which incorporated Part V. of the Railways Clauses Act, 1863, the Derbyshire Company's undertaking was transferred to and amalgamated with that of the plaintiffs. Under these circumstances Neville J. has declared that the plaintiffs are entitled to exercise running powers for all their traffic, including traffic from the Derbyshire branch line, over the Midland line above mentioned. I am of opinion that his judgment cannot be supported. Amalgamation under the Railways Clauses Act, 1863, is of a peculiar and limited nature; the consequences of allowing two railway companies to amalgamate in the ordinary sense before that Act were far-reaching, affecting many other companies and persons, all of whom had a locus standi before the Parliamentary Committee in order to argue their objections: Part V. of the Act of 1863 was intended to do away with this troublesome and expensive

C. A. 1911 — GREAT CENTRAL RAILWAY v. MIDLAND RAILWAY. — Farwell L.J.

process, and it does so by keeping the dissolved company alive for the purpose and as a means of limiting and measuring the rights acquired by the amalgamated company, and objections by other companies to the amalgamation were thus obviated by shewing that the amalgamated company got nothing more as against them than the dissolved company had before the amalgamation. Thus by s. 38 the undertaking, rights, powers, &c., of the Derbyshire Company became vested in the plaintiffs and are to be held, used, exercised and enjoyed by them in the same manner and to the same extent as the same were at the time of the amalgamation, or, if the amalgamating Act had not passed, might be held, used, exercised and enjoyed by the Derbyshire Company. The status quo ante amalgamation of the two companies is preserved for the purpose of measuring and limiting the powers of the amalgamated company, and the question is what powers before the amalgamation had the Derbyshire Company over the Midland? The answer is that they had very limited powers under the agreements under which for special purposes they had access to and use of the Midland line. It is said that this is sufficient, because the plaintiffs have general running powers over the Midland, and when they have once obtained physical access to the Midland line by virtue of the Derbyshire Railway's powers they can enforce their own rights under their own powers. But this is the very thing that the Act was passed to prevent: on the true construction of that Act the plaintiffs as the Great Central Railway Company do not get access to the Midland under the Derbyshire agreement at all; it is the Derbyshire Company that has such access, and as that company could not avail themselves of the Great Central running powers, neither can the Great Central avail themselves of powers belonging not to them as the Great Central, but to the Derbyshire Company, which still exists for the very purpose of defining and limiting such powers. If this were not so I fail to see the meaning of s. 38 or the use or object of Part V. of the Railways Clauses Act, 1863.

But then it is argued that, apart from any question of amalgamation or powers of the Derbyshire Company over the Midland, it is sufficient for the plaintiffs to bring a train into

physical contact with the Midland line, and that they are thereupon entitled to use that line either under s. 92 of the Railways Clauses Consolidation Act, 1845, or by virtue of their general powers. In my opinion this construction is not open to a company which has obtained such access under a statutory amalgamation: it would render the provisions of that Act useless in a great majority of cases. But apart from this I am further of opinion that neither the general law nor the case of *Midland Ry. Co.* v. *Great Western Ry. Co.* (1) supports the contention. It is true that s. 92 of the Railways Clauses Consolidation Act, 1845, gives a right to all the world to use the railway of any company very much as if it were an ordinary high road; but the section was passed at a time when the working of railways was not understood and is quite impracticable, and no Court would enforce its provisions by either injunction or mandamus: see *Powell Duffryn Steam Coal Co.* v. *Taff Vale Ry. Co.* (2), a case decided after *Midland Ry. Co.* v. *Great Western Ry. Co.* (1) by the same Court. It is clear, therefore, that mere physical access without more is not enough to support an application to the Court.

But then it is said that the plaintiffs have general running powers under their agreement of 1865 and that they are entitled to exercise these when they have got their train on the Midland line. But those running powers give them no right to form a fresh junction with the Midland line without their consent. The Derbyshire Company's agreement gives that company a limited right of access to and use of the Midland. The plaintiffs have no greater right than the Derbyshire Company, and that company had no right to use the Great Central running powers over the Midland. All therefore that the plaintiffs can say is that they are entitled to bring their trains along the Derbyshire Company's line up to the points which connect that line with the Midland line, but they have no right to have those points set so as to enable them to run on the Midland line except such as the Derbyshire Company had and for such purposes only as the Derbyshire Company could require them. The Midland concede this, but the plaintiffs claim the right to use them for all purposes. In my opinion this construction is untenable.

(1) L. R. 8 Ch. 841. (2) (1874) L. R. 9 Ch. 331.

C. A.
1911
GREAT CENTRAL RAILWAY v. MIDLAND RAILWAY.
Farwell L.J.

Lastly, it is said that the decision of this Court in *Midland Ry. Co.* v. *Great Western Ry. Co.*(1) binds us to decide in the plaintiffs' favour. The decision of course binds us, but I confess that I fail to see that it has any bearing on the present case. In that case no question of the Railways Clauses Act, 1863, arose: the Midland Company had running powers over the Great Western Railway; the Hereford Company had the right under a decree of James V.-C. to use the Barton junction on the Great Western Railway for their traffic. The Hereford Company then made an agreement with the Midland, terminable on six months notice, to allow the Midland to use the Hereford line and stations. Lord Romilly held that the agreement was ultra vires on the ground that a statutory company cannot delegate its powers to another company. The Court of Appeal reversed this, and Mellish L.J. says (2): "The real question to be decided is Are the plaintiffs entitled to use the Hereford line by virtue of their agreement with the Hereford Company, and are they entitled to use the Great Western line under and by virtue of their agreement with the Great Western Company?" And after referring to s. 92 of the Railways Clauses Consolidation Act, he says: "It is perfectly true that that clause has been of very little practical use, because it is so imperfect and is made subject to such conditions that not having the use of the stations, nor of the watering places, and being subject to all bye-laws and regulations, practically one company cannot use the line of another railway company without a working agreement. But when they have made a working agreement, and that working agreement is confirmed by Act of Parliament, the result of that is that they have got a right to use the line of the other railway company which is given them by s. 92, and the obstacles which might be otherwise put in their way are altogether removed, and it appears to me that if there is any line of railway opened into that they are entitled to go from one to the other." I think it plain that the decision rests on the fact that the Hereford Company had a valid agreement under which they were entitled to use the Barton Junction for all purposes and that the Midland Company lawfully obtained the full benefit of that agreement. In the present case

(1) L. R. 8 Ch. 841. (2) L. R. 8 Ch. 855.

C. A.
1911
GREAT CENTRAL RAILWAY v. MIDLAND RAILWAY.
Farwell L.J.

the Derbyshire Company had an agreement allowing them to use the Midland line for very limited purposes only: I find no sanction in the judgments of James and Mellish L.JJ. for the proposition that the acquisition of these limited powers gives the right to disregard the limits and use the powers so as to defeat them. It is not necessary to determine finally whether such a construction is open to them, for, as I have already said, I am of opinion that the plaintiffs have not added to their powers as Great Central Railway the powers of the Derbyshire Company, but are entitled only to stand in the place of the Derbyshire Company and exercise such powers only as that company could have exercised if there had been no amalgamation.

I am of opinion that the appeal should be allowed with costs here and below.

Solicitors: *Beale & Co.; Dixon H. Davies.*

G. A. S.

C. A.
1911
Oct. 31; *Nov.* 1.

In re WALFORD.

KENYON *v.* WALFORD.

[1910 W. 2944.

Will—Demonstrative Legacy—Fund wholly reversionary—No Time for Payment fixed by Will—Time from which Interest runs.

The testator bequeathed to his sister "the sum of 10,000*l.* as her sole and absolute property to be paid out of the estate and effects inherited by me from my mother in terms of her last will and testament and as regards the residue of the aforesaid estate and effects of my said mother so to be inherited by me in terms of her aforesaid will and of all my estate and effects at present in my possession and enjoyment I do hereby appoint as my sole heir or heirs" certain specified persons. The testator died in 1903. All the property to which he was entitled under the will of his mother was in reversion expectant on the life interest of his father, who died in 1910:—

Held, that the legacy of 10,000*l.* was a demonstrative legacy; that there was nothing in the will expressly directing payment to be made only when the reversion fell in; that the mere fact that the fund out of which the legacy was directed to be primarily paid was reversionary

C. A.
1911
WALFORD, *In re.*
KENYON *v.* WALFORD.

made no difference; and that interest on the legacy ran from the expiration of a year from the testator's death.

The rule of law as laid down by Lord Cairns in *Lord* v. *Lord* (1867) L. R. 2 Ch. 782, 789, applied.

The result in *Earle* v. *Bellingham* (No. 2) (1857) 24 Beav. 448, followed as the natural consequence of the admission by counsel in that case that the legacy was not payable until the reversion fell into possession, and is no authority for any general principle (nor is there in fact any such) that where a legacy is payable out of a particular fund, which is wholly reversionary, interest on the legacy does not run until the reversion falls in.

In re Gyles [1907] 1 I. R. 65, dissented from on this point.

Decision of Joyce J. reversed.

APPEAL from a decision of Joyce J.

By his will the testator, J. A. H. Walford, appointed his father his executor and made the following disposition:—"I give and bequeath to my sister Mary Joan Henshaw Walford the sum of ten thousand pounds sterling (10,000*l.*) as her sole and absolute property to be paid out of the estate and effects inherited by me from my mother in terms of her last will and testament . . . . and as regards the residue of the aforesaid estate and effects of my said mother so to be inherited by me in terms of her aforesaid will and of all my estate and effects at present in my possession and enjoyment I do hereby appoint as my sole heir or heirs such heir or heirs as will succeed to the estate of my father" and appointed by his father's will.

The testator died on June 3, 1903. All the property to which he was entitled under the will of his mother, who had died in 1900, was comprised in his parents' marriage settlement and was reversionary, being expectant upon his father's life interest therein.

The testator's father died in 1910, having by his will appointed executors and trustees, and (after a specific devise to his surviving son) given all the residue of his estate to his trustees in trust for his second wife, the defendant Emily de C. Walford, during widowhood, with remainder to the defendant R. H. Dunn absolutely, whom he made his heir in accordance with the terms of his son the testator's will.

The trustees took out a summons for the determination (inter alia) of the questions (1.) whether the testator's father had a

general testamentary power of appointment over the whole of the residuary real and personal estate of the testator, and, if so, whether under the will of the testator's father the whole of the trust funds representing such residuary estate ought to be held in trust for the defendant Mrs. Walford for life with remainder to the defendant R. H. Dunn absolutely, and (2.) whether the legacy of 10,000*l.* to the defendant Mary J. H. Walford carried interest and, if so, from what date and at what rate.

Joyce J. made a declaration that the whole of the trust funds representing the residuary real and personal estate of the testator were as from the date of the death of the testator's father held in trust for the defendant Mrs. Walford for life, and subject thereto in trust for the defendant R. H. Dunn absolutely; and his Lordship, being of opinion that on the question of interest on the 10,000*l.* legacy the case was not substantially different from *Earle* v. *Bellingham* (No. 2) (1), made a further declaration that the legacy carried interest at 4*l.* per cent. per annum as from the date of the death of the testator's father.

From the latter part of this order the defendant Mary J. H. Walford appealed.

Cave, K.C., and *W. M. Cann*, for the appellant. The general rule is that a pecuniary legacy bears interest as from the end of one year from the death of the testator unless there is an expression in the will to the contrary. There is no such expression in this will.

This is a true demonstrative legacy. There is an absolute gift to the appellant followed by a direction that it should be paid out of a fund which is pointed out. If that fund is deficient for payment of the legacy in full, the residuary estate will be liable to make good the deficiency; and if the residue consisted of a mixed fund of realty and personalty there would be a charge on the realty: *Greville* v. *Browne*. (2)

The legacy bears interest from the time when it is payable, namely, from the expiration of a year from the testator's death. It is not a legacy which is payable at a future day carrying

(1) 24 Beav. 448.
(2) (1859) 7 H. L. C. 689.

C. A. 1911 WALFORD, *In re.* KENYON *v.* WALFORD.

interest only from the time fixed for payment, as was the case in *Lloyd* v. *Williams* (1); *Heath* v. *Perry* (2); *Earle* v. *Bellingham* (No. 2). (3) The testator fixed no future day for payment in this case, and the fact that the fund pointed to for the payment happened to be reversionary makes no difference, for there is no distinction between a reversionary estate and any other kind: per Lord Hardwicke in *Lloyd* v. *Williams*. (1)

[COZENS-HARDY M.R. referred to *Lord* v. *Lord*. (4)]

The rule that interest was payable from a year after the death of the testator in respect of legacies which could not be paid until outstanding securities were got in was clearly stated by Sir W. Grant M.R. in *Wood* v. *Penoyre* (5), and in *In re Blachford* (6) the property of the testatrix, who died in 1869, was mainly reversionary and fell into possession in 1881, and it was held that the legatees were entitled to interest on their legacies from one year from her death.

In re Ludlam (7) is really not in point, for the only power that the testatrix had was a power to appoint reversionary property. *Earle* v. *Bellingham* (No. 2) (3) was followed in Ireland in *In re Gyles* (8), but in *Earle* v. *Bellingham* (No. 2) (3) there was ample ground to enable the Court to come to the conclusion that the testator fixed the time at which the legacy should be paid, and the decision is not applicable to this will.

We submit that interest ran on this legacy from the expiration of one year from the testator's death.

Hughes, K.C., and *Harman*, for the defendant Mrs. Walford. This is a specific, not a general legacy. A sum of money payable out of a specific fund is itself specific: per Rigby L.J. in *In re Grainger* (9); *Newbold* v. *Roadknight* (10); *Badrick* v. *Stevens* (11); Jarman on Wills, 6th ed. p. 1072. When there is a gift like this of 10,000*l.* "to be paid out of" a particular estate, that naturally and primarily means to be paid out of that estate and that only:

(1) (1740) 2 Atk. 108.
(2) (1744) 3 Atk. 101.
(3) 24 Beav. 448.
(4) L. R. 2 Ch. 782.
(5) (1807) 13 Ves. 325, 334.
(6) (1884) 27 Ch. D. 676.
(7) (1890) 63 L. T. 330.
(8) [1907] 1 I. R. 65.
(9) [1900] 2 Ch. 756.
(10) (1830) 1 Russ. & My. 677.
(11) (1792) 3 Bro. C. C. 431.

Page v. *Leapingwell* (1); *In re Jeffery's Trusts.* (2) There is a gift of the balance of the estate derived from his mother after deducting 10,000*l.* There is in this will no true residuary gift in the strict sense.

[COZENS-HARDY M.R. Joyce J. has held that there was a true residuary gift.]

We submit that on the construction of this will the true view is that 10,000*l.* was given out of the estate of the mother and only given when that estate fell into possession and became applicable for the payment of legacies. On the face of this will this legacy is given out of a reversionary interest, for the word "inherited" when first used is obviously equivalent to "*to be* inherited," and the legacy whether specific or demonstrative cannot be paid until the death of the testator's father. It is not charged on the reversionary interest, but is to be paid out of it, and the testator did not have in mind that the reversionary interest was to be sold to pay the legacy. Until the reversionary property falls into possession the legacy is not payable: *Earle* v. *Bellingham* (No. 2) (3); *In re Ludlam.* (4)

[FARWELL L.J. The mere fact that the legacy is payable out of a reversionary interest does not affect the question, unless you can shew from the words of the will that the payment is to be deferred.]

We submit that this is not a case where the property merely happens to be reversionary, but that on the face of this will the property is described in terms which express that it is reversionary and shew what the testator had in mind. This is a stronger case than *Earle* v. *Bellingham* (No. 2). (3)

[FLETCHER MOULTON L.J. This point was never really argued in *Earle* v. *Bellingham* (No. 2) (3) because Mr. Follett and Mr. Cooper admitted that the legacy was not payable until the reversion fell in. Has *Earle* v. *Bellingham* (No. 2) (3) ever been followed by any case in England?]

No; only in Ireland. The decision dates from 1857, and the Court will not now disturb the authority of it: *In re Ravensworth.* (5)

(1) (1812) 18 Ves. 463.
(2) (1866) L. R. 2 Eq. 68.
(3) 24 Beav. 448.
(4) 63 L. T. 330.
(5) [1905] 2 Ch. 1.

C. A. 1911 — WALFORD, *In re.* KENYON *v.* WALFORD.

[COZENS-HARDY M.R. In 1867 Lord Cairns stated the rule in *Lord* v. *Lord*. (1) In *Earle* v. *Bellingham* (No. 2) (2) the Master of the Rolls did not decide that the legacy was not payable until the reversion fell in as an adverse decision against any contention to the contrary. Counsel, in order to avoid the fatal objection of the Statute of Limitations, had to admit that the legacy was not payable until that event. The admission is noticed in the reports of the case in Beavan (2) and the *Law Journal* (3), but not in the report in the *Jurist*. (4)]

Earle v. *Bellingham* (No. 2) (2) has for many years been regarded in the profession as the authority for saying that the general rule as to interest on legacies does not apply where the fund out of which the legacy is primarily payable is wholly reversionary, and is referred to in support of that proposition in Jarman on Wills, 6th ed. p. 1108, and in Theobald on Wills, 7th ed. p. 189, and it was adopted by the Master of Rolls in Ireland in *In re Gyles*. (5)

[COZENS-HARDY M.R. The learned author of Williams on Executors, 10th ed. p. 1167, has rightly estimated the value of *Earle* v. *Bellingham* (No. 2). (2)]

The statement by Lord Hardwicke in *Lloyd* v. *Williams* (6) has no application in this case. That was not the case of a reversionary interest like this, but of a reversion created by the testator himself.

On both the above grounds, namely, (1.) that this is a specific legacy, and (2.) that, whether specific or demonstrative, the legacy is not payable until it falls into possession, we submit that interest does not run until the death of the testator's father.

P. M. Walters, for the defendant R. H. Dunn, adopted the same arguments.

S. Leeke, for the trustees.

COZENS-HARDY M.R. This appeal raises a question as to the date from which interest on a legacy of 10,000*l.* ought to be

(1) L. R. 2 Ch. 782, 789.
(2) 24 Beav. 448.
(3) 27 L. J. (Ch.) 545.
(4) 3 Jur. (N.S.) 1237.
(5) [1907] 1 I. R. 65.
(6) 2 Atk. 108.

calculated. The principle applicable to cases of this kind has been authoritatively laid down by Lord Cairns in the well-known case of *Lord* v. *Lord* (1): "The rule of law is clear, and there can be no controversy with regard to it, that a legacy payable at a future day carries interest only from the time fixed for its payment. On the other hand, where no time for payment is fixed, the legacy is payable at, and therefore bears interest from, the end of a year after the testator's death, even though it be expressly made payable out of a particular fund which is not got in until after a longer interval."

Now that is a perfectly clear general principle, and the question which we have to decide is whether it is applicable to the present will. Before coming to the language of this present will it is right that I should say something about what is alleged to be another general principle, which is that where you have a legacy which is payable out of a particular fund interest does not run upon that legacy if the property out of which it is payable is a reversion, but only runs from the time when the reversion falls into possession. So far as I am aware there is no foundation for any such principle. The authority relied upon by the learned judge (who I do not gather expressed any opinion of his own about this) was the case of *Earle* v. *Bellingham* (No. 2) (2), a case which it is quite true is now an old one decided in 1857, but which, when one looks at it, does not lay down any kind of general principle like that which has been relied upon. There, in 1806, a testator gave 7000*l.* to trustees upon trust for his wife for life and after her death for his sister, Mary Cooper. In 1822 Mary Cooper made her will, whereby she gave to Elizabeth Nicholas 1000*l.* and to Elizabeth Wake, Ann Wake, and Sarah Oriel the sum of 500*l.* to be equally divided between them, and went on "which said two legacies or sums of 1000*l.* and 500*l.* I direct to be paid out of the moneys arising out of my reversionary interest in the sum of 7000*l.*, given and bequeathed to me by the will of my brother John Cooper deceased, and which he directed to be payable to me at the death of his wife Caroline Cooper. And as to the residue of the said sum of 7000*l.* I direct it may form part of the residue of my personal estate hereinafter mentioned,"

(1) L. R. 2 Ch. 782, 789. (2) 24 Beav. 448.

C. A. 1911 — WALFORD, *In re.* KENYON *v.* WALFORD. — Cozens-Hardy M.R.

and she gave the residue of her personal estate to some other people. Mary Cooper died in 1822, and the widow of John Cooper lived until 1855, that is thirty-three years after the testatrix Mary Cooper's death. The plaintiffs, who were the legatees, claimed that they were entitled to have inserted in the decree a direction for payment of interest on these legacies for thirty-three years from the death of Mary Cooper, and in the argument they said that these were demonstrative legacies due and vested at the death, but that the payment of them was postponed by reason of the reversionary nature of the fund out of which they were payable. Counsel on the other side were not called upon. For a very obvious reason counsel for the plaintiffs did not allege that the legacies were payable at the death or within twelve months after the death of Mary Cooper, because the Statute of Limitations, which had been pleaded, would have been a complete and full answer to their entire claim; but they said "Although the legacies are not payable until the death of the widow we ought to have interest right back to the death." The Master of the Rolls said, if I may say so, with perfect accuracy that there is a difference between the right to a legacy and the right to receive a legacy, and that when a legacy is payable at a future, or not receivable until a future, date, that is the date from which alone interest runs. He said in effect "You admit these legacies are not payable until the widow's death and therefore of course you cannot get interest prior to that date." That was the only point decided in *Earle* v. *Bellingham* (No. 2). (1) I cannot find in it a trace of any suggestion that as a general rule a legacy payable out of a particular fund only carries interest when that fund, if reversionary, falls into possession. But then it is said that even if that is not true of *Earle* v. *Bellingham* (No. 2) (1)—which by reason I think of the head-note has rather got into the books as an authority beyond what it is—there is a decision of the Irish Court, *In re Gyles* (2), in which a view was expressed by the learned Master of the Rolls adverse to that which I have just stated. Although his decision in the case may be quite right on the first of the two grounds, with which I am not concerned, he goes on to say this: "Taking it for the purpose of this

(1) 24 Beav. 448. (2) [1907] 1 I. R. 65, 71, 72.

branch of my judgment that these legacies are not specific, and on the hypothesis that the time for payment has not been fixed by the testatrix, I am of opinion that interest runs from the death of the tenant for life," and then he refers to *Earle* v. *Bellingham* (No. 2) (1) and says that he thinks the decision there was in accordance with good sense, and cannot accept the suggestion that the language used by Lord Romilly was used inadvertently, and says, " He concludes his judgment with the observation, that interest did not run 'until the legacies were payable, which was on the death of the widow,' who was in fact the tenant for life. I think reason and authority combine to demonstrate that this is the correct view of the law, and accordingly my answer to the first question will be 'Yes,' and to the second, 'from the date of the death of the tenant for life.'" With the greatest possible respect to the learned Master of the Rolls I think he has misconceived the decision in *Earle* v. *Bellingham* (No. 2) (1), treating it as laying down a general rule which it certainly does not; it is merely a decision on an admission made by the plaintiffs in that case, who, if they had not made the admission that the legacies were only payable at the death of the widow, would have admitted themselves out of Court.

Then I come back to the language of this particular will. The only question here is whether on the language of this particular will the legacy is a specific legacy or a demonstrative legacy payable at a future date. If it is said to be a demonstrative legacy and no time for payment is fixed, it is quite plain that interest runs from twelve months after the death. Now the testator here was entitled under his mother's will to an interest in property. I care not whether it was at that date sold or not, but there was a trust for sale in the settlement. His mother's interest was postponed to the life interest of her surviving husband, and under the mother's will this reversionary interest was given to the testator, Lieutenant-Colonel Walford. What the will says is this: [His Lordship read the will, and continued.] Now I ask myself, is this specific? There is only one answer—No. I can see no ground whatever for holding it is specific. It seems to me to be a typical demonstrative legacy. It is a

(1) 24 Beav. 448.

C. A. 1911

WALFORD, *In re.* KENYON *v.* WALFORD.

Cozens-Hardy M.R.

legacy of 10,000*l.*, to be paid out of certain property. Is there anything in this will expressly directing payment to be made only when the reversion falls in? Again I can only answer that question by a negative. It seems to me to be exactly and precisely within the rule of law laid down by Lord Cairns in *Lord* v. *Lord.*(1) There is no time expressly directed for payment, and it makes not the slightest difference that the property out of which it was directed to be paid was a reversionary interest.

With great respect for the learned judge, from whom I am not sure that I am really differing so far as his own opinion goes, I think he has taken a wrong view of the authorities in this case, and I think interest on this legacy of 10,000*l.* runs from twelve months after the decease of the testator.

FLETCHER MOULTON L.J. I agree.

FARWELL L.J. I agree. The first question to be determined is whether it is a specific legacy or not. Now a demonstrative legacy is stated in these terms in Roper on Legacies, 4th ed. at p. 198: "A gift of so much money, intended for the legatee at all events, with a fund (the estate) particularly referred to for its payment; so that if the estate be not the testator's property at his death, the legacy will not fail, but be payable out of his general assets." Then in Williams on Executors, 10th ed., on p. 913 it says: "A legacy of quantity" such as this 10,000*l.* "is ordinarily a general legacy: but there are legacies of quantity *in the nature* of specific legacies, as of so much money, with reference to a particular fund for payment. This kind of legacy is called by the civilians *a demonstrative legacy;* and it is so far general, and differs so much in effect from one properly specific, that if the fund be called in or fail, the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets; yet the legacy is so far specific, that it will not be liable to abate with *general* legacies upon a deficiency of assets."

On reading this particular will I cannot bring myself to doubt

(1) L. R. 2 Ch. 782, 789.

that this is a typical demonstrative legacy. There is first the gift to the testator's sister of a sum of 10,000*l.* sterling as her sole and absolute property, and that is followed by a direction that it is "to be paid out of the estate and effects inherited by me from my mother" and so on. Then the question arises in this way: A general legacy, including in that term a demonstrative legacy, is payable ordinarily a year after the death of the testator unless the testator has given some directions for postponing payment, and the contention has been that the fact that he has directed it to be paid out of a reversionary interest is in itself conclusive to shew that the payment is to be deferred until that reversion falls in. In my opinion that is contrary to all the authorities and contrary to the law as I have understood it, at any rate so long as I have had anything to do with questions of this nature. It comes down to us from Lord Hardwicke, and I think the statement in *Lloyd* v. *Williams* (1)—although the report is so meagre as regards the statement of the will that it is difficult to follow—is meant as a general proposition of the law as it then stood and as in my opinion it still stands, namely, "A legacy does in its nature carry interest, and I know of no distinction between a reversionary estate and any other, and the time of payment of interest in this case ought to begin at the expiration of the five years according to the directions of the will"—that is to say, as the testator had mentioned the period of five years for making the payment,—and not when the reversion fell in, that was the time to take, and the falling in of the reversion made no difference.

When the date is not mentioned the law has fixed one year as the time. The mere fact that a legacy is to be paid out of a reversion is not evidence to shew that it is not to be paid at all until the reversion falls in. Here we have, in addition to a gift in the terms I have mentioned, a residuary gift, a gift which in itself implies that the 10,000*l.* is charged upon and payable out of residue. Supposing the whole of the property mentioned as the mother's property had been lost by unfortunate speculation or by the action of dishonest trustees, the legacy would still be payable out of residue, and so far as it is payable out of

(1) 2 Atk. 108, 110.

C. A. 1911 WALFORD, *In re.* KENYON *v.* WALFORD. Farwell L.J.

residue it is impossible to say that it is not payable within one year after the death unless there be express words to postpone it, and I can find no such express words in this will. In *Earle* v. *Bellingham* (No. 2) (1), which was the only decision relied upon,—and the Master of the Rolls has shewn that the express point did not arise for decision in that case—the claimants, if they had claimed that the legacy was payable within a year after the death, would at once have put themselves out of Court because it would have been statute-barred. The only decision in that case—it was not the case of a child, which stands on quite a different footing—was that the interest was not payable on the legacy except as compensation for non-payment of the legacy after it had fallen due. The legacy in that case had not fallen due admittedly, and therefore there was no possible claim that could have been made for interest on a legacy which was actually not payable.

For these reasons therefore I am unable to agree with the decision of the learned judge in the Court below.

Solicitors: *Johnson, Weatherall & Sturt, for George Hadfield, Bennett & Carlisle, Manchester; Trotter & Patteson; Trower, Still & Co.; May, How & Chilver, for How & Son, Shrewsbury.*

(1) 24 Beav. 448.

R. M.

MILLS *v.* UNITED COUNTIES BANK, LIMITED.

C. A. 1911 *Nov.* 1, 2.

[1910 M. 2049.]

Mortgage—Contingent Reversionary Interest—Equity of Redemption—Purchase—Implied Liability of Purchaser to indemnify Vendor against Mortgage Debt—Interest vesting in Possession—Express Indemnity—Exclusion of Implied Indemnity.

The plaintiff and his two brothers, who were partners in business, had mortgaged their respective contingent reversionary shares under their father's will to the defendant bank to secure an overdraft due from the firm. The plaintiff had further mortgaged his share to M. to secure a debt of his own. Upon the bank pressing for payment the plaintiff and his brothers agreed to sell their respective equities of redemption to the bank. By the deed of assignment the bank released the plaintiff and his brothers from all moneys owing to the bank on the security of their mortgages, but the bank's mortgages were to be kept on foot as a protection, so far as regarded the plaintiff's share, against M.'s mortgage. The deed also provided that upon the realization of the plaintiff's share the bank should first pay themselves, and then, after satisfying M.'s mortgage, should retain the surplus, if any. The bank also covenanted to pay all duties payable in respect of the shares and to indemnify the plaintiff and his brothers against the same. Before his share fell into possession the plaintiff brought an action for a declaration that he was entitled to be exonerated by the bank from all liability in respect of M.'s mortgage.

Eve J. held ([1911] 1 Ch. 669) that the application of the doctrine of *Waring* v. *Ward* (1802) 7 Ves. 332, which, in the absence of express contract to the contrary, throws upon the purchaser of an equity of redemption an implied obligation to indemnify the vendor against the mortgage debt, was, in the case of a mortgage of a contingent reversion, conditional upon the interest vesting in possession. He further held that, having regard to the existence in the deed of an express limited covenant of indemnity, no fuller indemnity could be implied; and on these grounds he dismissed the action:—

Held, on appeal, affirming the decision of Eve J. but without assenting to the first ground of his judgment, that the provisions of the deed were sufficient to negative in this case the application of the doctrine of *Waring* v. *Ward*.

Appeal from a decision of Eve J. (1)

The question arising on this appeal was whether the defendant bank, who had purchased from the plaintiff his equity of

(1) [1911] 1 Ch. 669.

C. A. 1911 MILLS v. UNITED COUNTIES BANK, LIMITED.

redemption in a contingent reversionary interest under his father's will, was liable, the reversionary interest not yet having fallen into possession, to indemnify the plaintiff against the mortgage debt.

Under the will of his father, Joseph Mills, who died on December 17, 1889, the plaintiff, Charles Frederick Mills, was entitled to one eleventh share of the testator's real estate in reversion expectant upon the death or second marriage of the testator's widow, Harriet Mills, and contingently upon his being alive at the date of such death or second marriage. The plaintiff's share was susceptible of augmentation by the death of any other of the testator's children without issue before the death or second marriage of the widow.

On October 30, 1902, the firm of R. Mills & Co., in which the plaintiff and his two brothers R. T. Mills and A. E. Mills were co-partners, was heavily indebted to the defendants, the United Counties Bank, Limited. At that time the plaintiff's reversionary interest was in mortgage, first, to the bank, under two deeds dated respectively June 24, 1897, and November 21, 1898, to secure the sum of 10,000*l.* and interest owing by the firm of R. Mills & Co., and, secondly, to his father-in-law, John Mobberley, under a deed dated March 14, 1899, to secure an advance of 2000*l.* to himself individually. The bank having commenced an action against the plaintiff and his brothers to recover what was due from them, an agreement was come to for staying the action and distributing the indebtedness amongst the partners, and for rearranging the securities held by the bank. This agreement included the purchase by the bank of the equity of redemption in the plaintiff's one eleventh share in the testator's estate, but not in anything which might accrue thereto. On the contrary, any interest which might attach to the plaintiff's eleventh share by way of accruer was, as between the plaintiff and the bank, to belong to the plaintiff, freed from the mortgages to the bank and to J. Mobberley.

This arrangement was carried into effect by an indenture of assignment dated October 30, 1902, made between the plaintiff and his two brothers of the first three parts and the bank of the fourth part. By this deed, after reciting, inter alia, the agreement for

the absolute sale by the three brothers of their respective reversionary interests in one eleventh part each of the residuary estate of J. Mills, and that the existing charges to the bank should be kept alive, but only for the protection of the bank against the subsequent charge of J. Mobberley, it was witnessed that, in consideration of the sum of 2000*l.* paid to the parties of the first three parts in the proportions there mentioned (the plaintiff receiving 666*l.* 13*s.* 4*d.*), each of them assigned his contingent reversionary interest in one equal eleventh part or share in the residuary real and personal estate of J. Mills to the bank, freed and discharged from the equity of redemption of the same parties under the mortgage of June 24, 1897, and the further charge of November 21, 1898, but subject to the moneys then owing on these securities which were intended to be kept alive, and subject also as to the share of the plaintiff to the second mortgage to J. Mobberley of March 14, 1899, and the principal sum of 2000*l.* and interest thereby secured, and subject to the payment by the bank of all duties payable to the Inland Revenue authorities upon the shares, interests, and premises thereby assigned. It was further witnessed that the bank conveyed, assigned, and released unto each of the parties thereto of the first three parts any additional share or interest in the residuary estate of the testator J. Mills to which such respective party might thereafter become entitled by reason of the death of any of his brothers and sisters without leaving issue so far as such additional share was comprised in and charged by the bank's mortgages or any of them to hold such additional share to such party thereto respectively freed and discharged from the said mortgages and from the mortgage of March 14, 1899, to the said J. Mobberley. And it was declared that the mortgages to the bank should not merge in the equity of redemption in the shares thereby assigned, but remain and be kept on foot as a charge on the shares so as to protect the bank so far as regarded the share of the plaintiff against all moneys owing by him to J. Mobberley, but for no other purpose; and it was also by the deed agreed and declared, inter alia, that upon the share and interest of the plaintiff in the residuary real and personal estate of J. Mills being paid over or realized the bank should, in the

C. A. 1911 MILLS v. UNITED COUNTIES BANK, LIMITED.

first place, retain out of such share, or the proceeds thereof, the sum of 4000*l.*, being the principal moneys due to them from the plaintiff under their securities, and all interest which might be then unpaid and which should have accrued due since the date of the deed in statement, and in the next place the said share or proceeds should be applied, so far as the same would extend, in payment of the principal and interest moneys which might be due to J. Mobberley, and the surplus, if any, should belong to and be paid to the bank for their own absolute use and benefit. And the parties of the first three parts covenanted with the bank to do every act and make all such appearances and answers and procure all such certificates and documents as would be necessary to enable the bank to effect insurances upon the life of each of the said three parties; and the bank thereby covenanted with the first three parties to pay all duties to the Inland Revenue in respect of the shares and interests thereby assigned, and to hold the said three parties indemnified therefrom.

At the date of this deed of assignment there was owing to J. Mobberley the principal sum of 2000*l.* with two years' arrears of interest, and no interest had been paid on the 2000*l.* since. J. Mobberley died on October 14, 1907, and the mortgage debt with the arrears of interest for two years and more was now vested in one of his daughters, Beatrice Maria Mills, the wife of the plaintiff. She had called upon her husband to pay the debt under the covenant contained in the mortgage deed of March 14, 1899, and he brought this action on July 13, 1910, claiming a declaration that he was entitled to be discharged and exonerated by the defendants from all liability in respect of this debt of 2000*l.* and interest, and that the defendants might be ordered to pay the debt to his wife.

The plaintiff's mother, Harriet Mills, did not marry again and was still alive. The plaintiff's interest, therefore, remained a contingent reversionary one. The plaintiff alleged in his claim that the effect of the purchase by and assignment to the bank of the equity of redemption in his one eleventh share in the residuary estate of the testator, subject to the mortgage of March 14, 1899, was that the defendants became subject to an implied contract or obligation to the plaintiff to indemnify him

against the mortgage of March 14, 1899, and the money thereby secured.

Eve J. held (1.) that the doctrine of *Waring* v. *Ward* (1) did not apply to the case of a mortgage of a contingent reversion unless the interest became vested in possession, and (2.), on the construction of the deed of assignment of October 30, 1902, that the existence in that deed of an express qualified covenant of indemnity negatived the implication of any fuller indemnity; and on these grounds he dismissed the action.

From this decision the plaintiff appealed.

Jessel, K.C., and *Somers Browne*, for the appellant. Eve J. said (1.) that the rule in *Waring* v. *Ward* (1) did not apply to a contingent reversion, and (2.) that on the construction of the deed in question there was an express covenant which negatived the implied covenant. The rule is well settled in equity that the purchaser of an equity of redemption is liable to pay off the money due upon the mortgage. The grounds of the rule are that a less price is given for the property because it is subject to the charge, and that the original mortgagor having parted with his property is less able to pay the debt than before: *Tweddell* v. *Tweddell* (2); *Woods* v. *Huntingford* (3); *Waring* v. *Ward* (1); *Wolmershausen* v. *Gullick* (4); and even an immediate purchaser, where there was a sub-purchaser expressly liable on a covenant, was held liable on the implied covenant: *Ashby* v. *Jenner*. (5) The whole question was considered in *Adair* v. *Carden* (6), which is in our favour, and which shews that the liability is not limited to the extent of the property. In *Dodson* v. *Downey* (7) the principle was extended to a share in a partnership.

[FARWELL L.J. The note to that report on p. 621 is wrong in stating that the obligation rests upon contract. It rests upon conscience, not contract.]

A covenant to pay interest does not negative the implied contract: *Bridgman* v. *Daw*. (8)

(1) 7 Ves. 332.
(2) (1786) 2 Bro. C. C. 101, 152.
(3) (1796) 3 Ves. 128.
(4) [1893] 2 Ch. 514.
(5) (1888) 32 Sol. J. 576.
(6) (1892) 29 L. R. Ir. 469.
(7) [1901] 2 Ch. 620.
(8) (1891) 40 W. R. 253.

C. A. 1911 — MILLS v. UNITED COUNTIES BANK, LIMITED.

[FLETCHER MOULTON L.J. You say that the bank are bound to pay Mobberley if he sues, but that is inconsistent with the clause that they are to pay themselves first and then him.]

That is only on realization. There is the difference between the security and the covenant. The clause gives Mobberley no better right, but only says what is to be done with the moneys.

[FARWELL L.J. But that clause deals with realization by the exercise of the power of sale and not merely through the fund falling into possession, and that is what presses upon me, because the bank then are made the masters of the situation.]

It was clearly the intention of the parties that the mortgage was to be borne by the bank. They get the property subject to all the charges. It is said that the plaintiff has sold his equity of redemption for practically less than nothing.

[FLETCHER MOULTON L.J. No. The bank purchased whatever surplus there might be for 666*l.*]

The declaration against merger is the usual clause to prevent an intermediate incumbrancer from becoming first mortgagee.

[FARWELL L.J. An implied covenant for indemnity cannot exist side by side with an express covenant to indemnify.]

By the second witnessing part of the deed the bank released the plaintiff's additional share, which might subsequently accrue to him, freed and discharged from the bank's mortgages and from Mobberley's mortgage. That really amounts to an obligation to indemnify the plaintiff against Mobberley's mortgage.

P. O. Lawrence, K.C., and *F. Thompson*, for the respondents, were stopped by the Court.

COZENS-HARDY M.R. This is an appeal by the plaintiff from the judgment of Eve J. in an action in which the plaintiff seeks a declaration that he is entitled to be discharged and exonerated by the defendants from all liability in respect of a sum of 2000*l.* and interest owing by the plaintiff to, as it happens, the plaintiff's wife. That is a mere accident. In my view nothing turns on that at all. The claim is based on this ground. It is said that according to the settled law of the Court a purchaser of an equity of redemption is bound under an implied obligation, or, as it is sometimes put, an obligation of conscience, to

indemnify the vendor against the liability on the mortgage debt; and in an ordinary case that is, I think, obviously according to justice and common sense. If a property is worth 10,000*l.* and is subject to a mortgage of 5000*l.*, and the purchaser only pays the vendor 5000*l.* and gets the property, it would be almost shocking to say that in that case the vendor would be liable on the covenant to pay the full sum of 5000*l.* to the first mortgagee and that the purchaser was under no obligation to indemnify him. But that is a principle of law which must of course bend to the circumstances of the particular case. It is an implication and not an express obligation, and when you have to deal with an implication you must, of course, have regard to all the circumstances of the case and to all the relations between the parties as expressed in the purchase deed; and if you find in the purchase deed something to satisfy you that it was not the real intention of the parties that the purchaser should take upon himself the liability to indemnify the vendor against the mortgage, there is nothing that binds the Court to adopt the ordinary rule.

Now there are two points made by the learned judge which I should just like to refer to before I come to the construction of the deed. The interest of the vendor here was both contingent and reversionary. That interest has not yet fallen into possession. The learned judge seems to have thought that the doctrine of *Waring* v. *Ward* (1) would have no application to the purchase of a contingent reversion which might or might not fall into possession, and that the whole doctrine depended upon the purchaser having gone into possession and enjoyment. If this case had turned on that doctrine I should certainly have required it to be more fully argued, because as at present advised I cannot assent to that view of the law. But the learned judge goes on to say (2) "that the implication of an unqualified personal liability on the part of the purchaser is negatived in this and in all cases where there is an express qualified indemnity, or where the circumstances and nature of the transaction are otherwise of a nature to rebut such implication." That is a proposition to which I give my full assent, and it is on that ground that I think Eve J.'s decision must be supported.

(1) 7 Ves. 332. (2) [1911] 1 Ch. 675.

C. A. 1911 — MILLS v. UNITED COUNTIES BANK, LIMITED. — Cozens-Hardy M.R.

The relations between the parties here were by no means simple, and the deed which we have to construe is, I think, one of the most inartistically framed and one of the worst drawn deeds which it has been my lot to construe for a very long time. It appears from the recitals of this deed that the bank had a first mortgage of 9000*l.* upon the shares of three brothers—there were eleven members of the family, I think, and the bank held a mortgage of 9000*l.* on the shares of the three brothers. In the present case we have only to do with one of the brothers, the plaintiff Charles. It is perfectly clear that no one of those three brothers could have redeemed his own share except on the terms of paying the full 9000*l.* By a subsequent deed the bank obtained a further charge subject to an express provision that not more than 1000*l.* was to be debited against each of these three shares. The substance of that transaction was that Charles could not have redeemed his share except upon paying 10,000*l.* to the bank. The bank had commenced an action against the three brothers on their covenant in the subsequent deed under which they were personally liable for an overdraft to the sum of upwards of 20,000*l.* There was obviously no defence to that action; it did not proceed to judgment, but it is impossible to suggest that there was any defence to it. It appears also that there was a second mortgage of 2000*l.* on Charles's share to John Mobberley, who was his father-in-law.

In those circumstances it appears on the face of this deed that a transaction took place with regard to which this much is perfectly clear, that the bank most anxiously and carefully guarded and protected themselves in every conceivable way against Mobberley's mortgage. The recitals are very clear. I will read the material parts. "It has been agreed between the parties hereto"—that is the three brothers and the bank—"that the parties hereto of the first three parts shall absolutely sell to the bank their respective reversionary interests in one eleventh part each of the said residuary estate," subject to bringing into account 5000*l.* which they had had advanced to them—nothing turns on that—and subject also to the moneys owing to the bank under their charges—that is to say, the 10,000*l.* — "and subject also as regards the said share of the said Charles

Frederick Mills to the said second mortgage of the said John Mobberley for the sum of two thousand pounds." Then it goes on, "but that all the existing charge or charges" of the bank "or any of them shall be kept alive but only for the protection of the bank against the subsequent charge of the said John Mobberley and all other (if any) the charges or incumbrances which may exist on the said shares or any of them and for no other purpose, and it has been agreed that such sale shall not include any further or additional share in the said residuary estate to which the said parties of the first three parts or any of them may hereafter become entitled" by reason of the death of any of the brothers or sisters of the parties thereto of the first three parts. The subsequent recitals I need not read. Then we come to the operative part. The first operative part is an assignment by each of the three parties as beneficial owner of his one eleventh, and the exception from that one eleventh of the additional shares, which is the most curious exception I ever saw as a matter of conveyancing—"and also except the additional shares and interests in such residuary real and personal estate hereinafter conveyed released and assigned by the bank to the said parties hereto of the first three parts and the interest dividends rents profits or income thereof and accumulations added thereto except in respect of such additional shares and interests as aforesaid." That is to be held subject to the bank's mortgages, "all of which are intended to be kept alive in manner hereinafter provided" . . . . "and subject also as to the share of the said Charles Frederick Mills to the said second mortgage to the said John Mobberley" . . . . "and subject to the payment by the bank of all duties payable to the Inland Revenue authorities upon the said shares and interests and premises hereby assigned and conveyed." Then there is a second witnessing part on which Mr. Somers Browne has courageously attempted to found an argument. That deals simply with the accrued share. The bank, whose charges for the nine thousand or ten thousand pounds odd would have covered not merely the original one eleventh but any accrued share, releases the accrued share freed and discharged from the bank mortgages and from Mobberley's mortgage for the sum of 2000*l.* and interest thereby

C. A. 1911 — MILLS v. UNITED COUNTIES BANK, LIMITED. — Cozens-Hardy M.R.

secured. It is said that that is really an obligation by the bank that they will indemnify the vendor, Charles Frederick Mills, against Mobberley's mortgage. That is said in the face of the express recital that the 10,000*l.* mortgage was to be kept alive to protect the bank against Mobberley's mortgage, and that the assignment was to be subject to Mobberley's mortgage. I think that argument on the second witnessing part is quite hopeless.

Then we come to a release of all debts owing to the bank, and a provision that the bank charges are not to merge in the equity of redemption, but are to remain and be kept on foot as a charge on the shares so as to protect the bank and their assigns, and, so far as regards the share of Charles, against all moneys so owing by him to Mobberley as aforesaid, and all other mesne incumbrances. Why are we not to give effect to that? It seems to me that, not once, but twice at least, if not three times, there is an emphatic declaration in this deed that the bank were to be protected in every conceivable way against Mobberley's mortgage and any obligation under it.

Then comes a clause on which I think also a material argument might be raised, namely, the declaration of the trusts which are to arise when the reversionary interest is realized. The bank are first to take 4000*l.*, and then Mobberley is to get what is due to him, if there is any surplus, and after that the balance is to be taken by the bank. Then comes a clause to which I attach extreme importance. There is in this deed an express covenant by the bank that they will indemnify the vendors, and the extent to which they will indemnify the vendors is stated. The covenant is by the bank with each of the three vendors, including Charles, "That the bank their successors and assigns will pay all duties payable to the Inland Revenue authorities in respect of the shares interests and premises hereby assigned and will hold harmless and indemnified the said parties hereto of the first three parts from all claims and demands in respect of or on account thereof." If it were any part of the bargain between the parties to this deed that the bank should indemnify the vendor against Mobberley's mortgage, where would it be found? Undoubtedly in this last covenant. That is the place where you would

expect to find the particular items against which an indemnity was to be given, and in the face of the recitals in the deed, and in the face of the anxious endeavour to protect the bank against Mobberley's mortgage, and in the face of this final covenant in the deed, I cannot myself feel any doubt that the doctrine of *Waring* v. *Ward* (1) has no application to this case. The circumstances of the parties and the terms of the deed suffice to negative the implication, which of course must give way to the express terms of the deed.

In my opinion the judgment of Eve J. was quite right, and this appeal must be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion, on the short ground that in my view this deed contains all the terms of the bargain between the parties. Of course, the doctrine of *Waring* v. *Ward* (1) that there is an implied covenant on the part of a purchaser of an equity of redemption to indemnify the vendor against the mortgage debt is based on good sense. It relates, I think, to every case where you can reasonably imply that it was the intention of the parties that that should be done, but I doubt whether it applies to any other case. In the present case we have an elaborate deed which convinces me that it was not the intention of the parties that there should be this indemnity. On the other hand, I think that that which was to take its place is expressly set out in the deed, and when I find a deed which fully expresses the contract between the parties I decline to add anything by way of an implied contract. I think it is quite clear that the parties here, who were negotiating and making a contract between themselves, had the whole matter fully before them, and that if this indemnity had been intended we should have found it expressed in the deed, and if they did not intend that the implied covenant of indemnity should exist between them, then we are bound not to read it into this deed. What do I find? I find a most careful reservation of the rights of the first mortgagees; it is described as being to protect them against a second mortgage to Mobberley, and also to protect them against the moneys owing

(1) 7 Ves. 332.

C. A. 1911 — MILLS v. UNITED COUNTIES BANK, LIMITED. — Fletcher Moulton L.J.

by the mortgagor to Mobberley under that mortgage. Those two recitals seem to me perfectly clear. And then I find, what influences me very much, a covenant between the parties as to what is to be done when the estate is realized. I conceive that both parties gained a great deal under that covenant. Charles Mills has first to pay 4000*l.* to the bank, and then, if there is enough, Mobberley is to get his 2000*l.* It seems to me that is wholly inconsistent with the idea that the bank were bound to indemnify Charles Mills against the money owing to Mobberley, for in that case, of course, all those provisions would have been idle; the bank would have had to pay Mobberley either as owners of the equity of redemption or as persons bound to indemnify Charles.

It seems to me that on the true construction of this deed there is no covenant to indemnify, and therefore the appeal fails.

FARWELL L.J. I agree that Eve J.'s decision is right, although I cannot altogether agree with the reasoning on which his judgment is founded. He treats the unwritten obligation which binds the transferee of an equity of redemption to indemnify the transferor against the mortgage debt as if it were a legal covenant. I venture to think that it is and has always been treated as one of those equities, independent of contract, of which there are many instances in the books. Thus Lord Redesdale says: "The principle established in the case of *Deering* v. *Lord Winchelsea* (1) is universal, that the right and duty of contribution is founded in doctrines of equity; it does not depend upon contract. If several persons are indebted, and one makes the payment, the creditor is bound in conscience, if not by contract, to give to the party paying the debt all his remedies against the other debtors. The cases of average in equity rest upon the same principle. It would be against equity for the creditor to exact or receive payment from one, and to permit, or by his conduct to cause, the other debtors to be exempt from payment. He is bound, seldom by contract, but always in conscience, as far as he is able, to put the party paying the debt upon the same footing with those who are equally bound": *Stirling* v. *Forrester*. (2) These equities still

(1) (1800) 2 Bos. & P. 270. (2) (1821) 3 Bli. 575, 590.

exist, although they are now sometimes erroneously called implied contracts. I doubt if the cases relating to express covenants to which Eve J. refers apply to the case of an equity. Generally speaking, when A. sells and B. buys an equity of redemption, i.e., in other words property subject to a charge, it is against conscience and honesty for B. to set up that he has bought the property free from the charge at A.'s expense; but this has no application to a case like the present where the deed contains dealings of a complicated nature relating to several shares and interests in a fund which is in itself contingent and reversionary, and express provision as to indemnity.

Again I wish to guard myself from appearing to agree with Eve J.'s conclusion that the equity does not apply to the case of a contingent or reversionary interest or is conditional on the interest vesting in possession. As at present advised I see no reason for this opinion, but as it has not been argued I will not say more than that.

The matter in this case turns on the construction of the deed. Can I find from anything in the deed that the intention of the parties is such that any Court of Equity is bound to hold that the bank are compelled in conscience to indemnify the vendor against this mortgage of 2000*l.* to Mobberley? It seems to me clear on the face of the deed that the contrary is the case. The first matter is the recital, which is borne out further by the proviso that the prior mortgages of the bank are to be kept alive so as to protect the bank and their assigns so far as regards the share of the said Charles Mills against all moneys so owing by him to Mobberley as aforesaid. That to my mind is almost conclusive by itself. It is to be observed that it is the bank who are to be protected, not the mortgage property. It is not merely that the mortgage property is to be protected, but the bank themselves are to be protected, and yet the contention in the face of that proviso is that the bank are to pay the 2000*l.* against which they are protected, in order to protect Charles Mills against the threat of Mobberley to sue him. It seems to me it would be contrary to the plain construction of the deed to say the bank are to do anything of the sort. There is further an indication of intention in the words of the covenant for the

C. A. 1911 MILLS v. UNITED COUNTIES BANK, LIMITED. Farwell L.J.

payment by the bank of the Inland Revenue duties coupled with the absence of any covenant to pay Mobberley. With regard to the next testatum it is explained by the provision as to the division of the purchase-money of the reversion when it falls into possession. Then the accrued share is to be taken by the vendor freed and discharged from Mobberley's mortgage. It has been argued that that implies a covenant by the bank to indemnify. Such a construction is wholly inconsistent with the rest of the deed, and if it is tested by reading in the words "as hereinafter provided" it is simple and clear. It is freed and discharged because all the shares transferred to the bank are when sold and realized, or when paid over on the reversion falling in, to be applied after paying the bank in paying off Mobberley. That exonerates and is in relief of the accrued share which is also subject to Mobberley's mortgage. On these grounds I agree that the appeal should be dismissed.

Solicitors: *F. Venn & Co., for Bartley, Bird & Co., Liverpool; Field, Roscoe & Co., for Jobson & Marshall, Dudley.*

G. A. S.

JOYCE J.
1911
Nov. 15.
1912
Jan. 19.

In re POULTNEY.
POULTNEY *v.* POULTNEY.

[1911 P. 1113.]

Will—Construction—Shares to Children—Gift over to Survivors—"In case of the death"—Vesting—Divesting.

Where a testator, after devising and bequeathing his estate (from and after the decease of his widow, to whom he had given a life interest) to be divided between his children, naming them, added after the testatum a clause that, in case of the death of any one or more of the children, the share or shares should be divided between the survivors:—

Held, that the clause referred to death only in the testator's lifetime, and that a child who survived the testator and died before the tenant for life was entitled equally with those who survived the tenant for life to share in the testator's estate.

SUMMONS.

The will of James Poultney, dated July 8, 1873 (omitting immaterial parts), was as follows:—

"I direct that all my just debts funeral and testamentary expenses be paid and satisfied by my executrix . . . . I give devise and bequeath unto my dear beloved wife Sarah Poultney all and every my household furniture . . . . and also all and every sum and sums of money . . . . and also all my stocks . . . . and . . . . securities . . . . and all and every other my estate and effects whatsoever and wheresoever both real and personal . . . . for her own use and benefit for her life And I direct that my beloved wife be permitted to have the use and enjoyment of my house and household effects for her life and to receive from my death the net annual income actually produced by my estate . . . . for her life And from and after her decease upon trust to divide my trust estate equally between my children as hereunto described" naming eight "and all others born under wedlock (if any) I empower my said executrix her heirs or assigns for the time being from time to time to dispose of a part of my trust estate if required but with the free consent of my said executrix during her life as may be deemed expedient And I . . . . appoint my dear beloved wife Sarah Poultney my

JOYCE J. 1912 POULTNEY, *In re.* POULTNEY *v.* POULTNEY.

sole executrix of this my will In witness whereof I have hereunto set my hand the 8th day of July 1873 and hereby revoking all former or other wills and testaments by me at any time heretofore made I declare this to be my last will and testament date and year as above written I direct that in case of the death of one or more of my children that their equal share or shares are to be equally divided between the survivors." Then followed the signature and attestation.

The testator died on March 12, 1880, and his will was duly proved.

The eight children named in the will survived the testator.

The testator's wife also survived him and died on July 1, 1910.

Prior to her death one of the eight children, namely, Sarah Elizabeth Poultney (who had married), died intestate leaving issue.

The testator's eldest son, to whom letters of administration de bonis non of the testator's estate had been granted, took out this originating summons, making the six other surviving children and George Harry Davies, the eldest son of the deceased child, defendants, for the determination of the question (inter alia) whether on the true construction of the will, in the events which had happened, the heir and personal representative of Sarah Elizabeth Poultney were entitled to share in the estate of the testator.

H. C. Bischoff, for the plaintiff. The question is the meaning of "survivors" in a peculiar will.

George Henderson, for the children who survived the tenant for life. The estate of the testator was, on the death of the widow, divisible in sevenths and not in eighths. The gift to the children being after a life estate, the words "in case of the death of one or more of my children" refer to death at any time before the vesting in possession, whether before or after the testator: Theobald's Law of Wills, 7th ed. p. 659; *Penny* v. *Commissioner for Railways* (1); Hawkins on Wills, pp. 254 et seq. The child who died before the tenant for life is therefore excluded. *Cripps* v. *Wolcott* (2) is conclusive of the point.

(1) [1900] A. C. 628, 634. (2) (1819) 4 Madd. 11.

T. T. Methold, for G. H. Davies, representing the deceased child. The gift over to surviving children has reference only to death in the testator's lifetime, not to death at any time before the tenant for life. Where distribution is for the benefit of children vesting and period of survivorship are to be as early as possible: *Bouverie* v. *Bouverie*. (1) The rule that the Court leans in favour of early vesting, where the construction of the gift is ambiguous, rather than to postponing it to the death of the parents, is laid down in *Howgrave* v. *Cartier*. (2) In the present case the gift over is quite ambiguous on the face of it. The rule applies equally to wills and settlements: *Jackson* v. *Dover*. (3) *Cripps* v. *Wolcott* (4) was the first case which departed from the old authorities.

G. Henderson in reply. The gift to the children vested at the testator's death, but the share of the child who subsequently died before the tenant for life was thereby divested. *Cripps* v. *Wolcott* (4) compels the Court to decide in favour of these defendants. The survivorship must be referred to the period of distribution: Jarman on Wills, 6th ed. pp. 2123, 2128.

Cur. adv. vult.

Jan. 19. JOYCE J. The testator in this case, after making certain dispositions of chattels and other things in favour of his wife, and directing that she should be permitted to have the use and enjoyment of his house and household effects, and so on, for her life, directed that from and after her decease his trust estate should be divided equally between his children "hereunto described, James Thomas Poultney, my eldest son, Gaius Philip Poultney, Eusebius Arthur Poultney, Ernest Stacey Poultney, Walter Ward Poultney, Herbert Edward Poultney, Sarah Elizabeth Poultney, also Louisa Clarissa Poultney and all others born under wedlock (if any)." Then there is a power to the executrix (the widow) to dispose of a part of the trust estate if required and the appointment of the executrix, and then comes the testatum: "In witness whereof I have hereunto set my hand

(1) (1847) 2 Ph. 349.
(2) (1814) 3 V. & B. 79.
(3) (1864) 2 H. & M. 209.
(4) 4 Madd. 11.

JOYCE J. 1912 POULTNEY, *In re.* POULTNEY *v.* POULTNEY.

the 8th day of July 1873 and hereby revoking all former or other wills and testaments by me at any time heretofore made I declare this to be my last will and testament date and year as above written." Then follows a new or additional clause—I have looked at the original will, and this additional clause is in the handwriting of one of the witnesses, inserted after the engrossment of the will but before execution—"I direct that in case of the death of one or more of my children that their equal share or shares are to be equally divided between the survivors"; and then comes the signature.

I think the materiality, if any, of the position of this clause is that it is altogether detached from the clause which speaks of the decease of the widow, almost as much as if it were in a separate instrument, for instance a codicil. The survivorship referred to in this additional clause, as I will call it, cannot possibly, in my opinion, refer to any survivorship other than survivorship upon the death of the child whose share is to go over. The clause is quite general. Taken literally it would operate not merely during the testator's life, or during the life of the widow, the tenant for life, but at any time. But that, of course, cannot possibly be, as is pointed out by Lord Cairns L.C. in *O'Mahoney* v. *Burdett* (1), where, speaking of the different classes of cases referred to in *Edwards* v. *Edwards* (2), he says this—I know that what he is speaking of is not exactly this case, but I think it is material —"The first class of cases is that where there is a gift to A., and if he shall die to B. If in such a case the words are to be read literally, you have, in the first place, the absolute gift, and then a gift over in the event of death; an event not contingent but certain, and in order to avoid the repugnancy of an absolute giving and an absolute taking away, the Court is forced to read the words 'in case of death' as meaning in case of death before the interest vests."

The question, therefore, here arises, To what period is the operation of this additional clause at the end of the will to be limited? But for some such clause as this, and omitting the cases where s. 33 of the Wills Act would be applicable, there

(1) (1874) L. R. 7 H. L. 388, 395.
(2) (1852) 15 Beav. 357; 21 L. J. (Ch.) 324.

would have been a lapse in case of the death of any one of the children in the lifetime of the testator. This clause, notwithstanding the peculiar form of it, a gift to survivors, would operate to prevent that (see p. 269 of Hawkins on Wills). However, in fact, all the children named in the will survived the testator and attained vested interests. If, then, the clause in question could have any operation after the death of the testator, it would operate only by divesting shares of those who survived the testator.

It is a general principle—I am reading this from Underhill and Strahan's Interpretation of Wills and Settlements, 2nd ed. p. 283—that "a provision purporting to divest in certain events a gift once vested, is not favoured by the Court, which will be astute to find other expressions, making it doubtful whether the document should be interpreted literally, in which case the gift over will be restricted to the happening of the contingency *before* the first gift is vested." A common case of this is that which is exemplified perhaps best among the latter cases by *In re Cobbold* (1), where the Court of Appeal laid it down broadly that "it is now a well settled principle that, where there is a gift by will to A. for life, and after his death to his children in terms which give the children an absolute interest in A.'s lifetime, followed by a gift over 'if A. dies without leaving children,' the word 'leaving' is so to be construed so as not to destroy any prior vested interest"; and "without leaving children" will even be construed into "without having had a child who attained a vested interest." That is an instance of the extreme anxiety of the Court to prevent the divesting of interests vested in the children. Again, it is well settled that provisions for children are not to be read as contingent on surviving the parent, unless the intention to that effect be perfectly clear. For that I may refer to the rule in *Hougrave* v. *Cartier* (2), although, as a matter of fact, that was a case of a settlement.

In the case before me a daughter who survived the testator has died leaving issue. If the clause in question had to be construed to operate not only during the lifetime of the testator, but during the lifetime of the tenant for life, the result might have been most extraordinary because, the survivorship being such as I

(1) [1903] 2 Ch. 299. (2) 3 V. & B. 79.

JOYCE J. 1912 POULTNEY, *In re.* POULTNEY *v.* POULTNEY.

hold it to be in this clause, from time to time as one of the children died his or her share would go to those then surviving (Hawkins, p. 263). And this clause would not operate on accruing shares—that is clear. So it might operate on original shares until the death of the last survivor but one. It would not operate on the death of the last because there would be no survivors to take. It would operate on the death of the last survivor but one, but would not affect the share of the last survivor, though he or she died in the lifetime of the tenant for life, nor, as I have said, would it operate upon accruing shares. That would be a most extraordinary result, and one which I think was never contemplated by the testator, or by any one who had to do with the drafting of the will.

But it was contended before me that the case was covered by the rule established, or supposed to be established, by *Cripps* v. *Wolcott* (1), which rule is stated very generally in Hawkins at p. 261. In *Cripps* v. *Wolcott* (1), however, there was a provision for the husband during his natural life, and upon the decease of the husband the money was to be divided between the sons and daughter named "and the survivors or survivor of them, share and share alike," the only death mentioned in the clause being that of the husband, the tenant for life. Even then, as Mr. Vaughan Hawkins says at p. 262, "The rule will readily yield to indications of a contrary intention, where a different point of time is mentioned in immediate connection with the words of survivorship"—as in this case—and then he goes on to discuss *Scurfield* v. *Howes* (2), and particularly *White* v. *Baker* (3) in the Court of Appeal. After mentioning this case Mr. Vaughan Hawkins says, at p. 260, "Similarly, the gift over in case of the death of one legatee to the survivors, may be restricted by the survivorship being referred to the period, not of distribution, but of *vesting*, according to the doctrine of *Crozier* v. *Fisher* (4)"; as in *Bouverie* v. *Bouverie* (5), which Mr. Methold has cited to me.

Upon the whole my opinion of this will is that the clause in question ought to be construed as operating only during the

(1) 4 Madd. 11.
(2) (1790) 3 Bro. C. C. 90.
(3) (1860) 2 D. F. & J. 55.
(4) (1828) 4 Russ. 398.
(5) 2 Ph. 349.

testator's life, that upon his death the shares vested, and that the clause ought not to be held to divest any of the shares so vested. I am not aware of any authority that precludes me from coming to that decision and so holding, and therefore I do hold that, with reference to the share of the daughter who survived the testator and died, in fact leaving issue, in the lifetime of the tenant for life, her share is not divested and therefore, according to this will, goes as to realty to her heir, and as to personalty, to her legal personal representative.

Solicitors : *Simpson, Palmer & Winder ; J. E. Anthony.*

A. L.

In re EARL OF EGMONT'S SETTLED ESTATES. LEFROY *v.* EGMONT.

[1911 E. 617.]

Settled Land—Heirlooms—Estate Duty—Succession Duty—Interest—Tenant for Life—Remainderman—Liability to pay Interest—Capital Moneys derived from Land applied in Discharge of Incumbrances on Heirlooms—Jointure —"Free from all deductions"—Succession Duty Act, 1853 (16 *&* 17 *Vict. c.* 51), *ss.* 32, 42, 44—*Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 9, *sub-s.* 5—*Settled Land Act*, 1882 (45 *&* 46 *Vict. c.* 38), *s.* 21 ; *s.* 37, *sub-s.* 2.

In 1889 estates were settled in strict settlement and heirlooms were settled upon trusts to correspond as nearly as might be to the uses of the freeholds. Under that settlement the seventh Earl of Egmont became tenant for life and the eighth became tenant for life in remainder. The seventh Earl died in 1897. Under a power contained in the settlement the eighth Earl granted to his wife a jointure "free from all deductions." He died in 1910. Estate duty and succession duty on the heirlooms were not paid in 1897, and the Crown now claimed the duties and interest thereon. The trustees had in their hands investments representing capital moneys and rents accrued during the lives of the eighth and the present Earl :—

Held, that the settlement must be treated as one settlement of the estates and of the heirlooms ; that the interest must be paid out of the income of the estate accrued during the lives of the tenants for life ; that capital moneys raised from other parts of the settled property might be applied in discharging incumbrances on the heirlooms ; and

WARRINGTON J.

1911

EGMONT'S (EARL) SETTLED ESTATES, *In re.* LEFROY *v.* EGMONT.

that according to the true construction of the settlement and grant the succession duty on the jointure must be paid out of the capital moneys.

PRIOR to August 15, 1889, the Egmont estates stood settled to the use of the seventh Earl of Egmont for life, with remainder to the use of the eighth Earl in tail; and heirlooms were settled in the usual way to go, so far as the rules of law and equity would permit, and to be held upon the same trusts as the estate. Under those trusts the eighth Earl was absolutely entitled to the heirlooms, subject to the life interest of the seventh Earl. Under these circumstances a resettlement was effected in August, 1889, by a disentailing deed and an assignment by the seventh and eighth Earls of the heirlooms. The deed of settlement, which was dated August 15, 1889, settled the estate in strict settlement, and with regard to the heirlooms appointed that the trustees, in whom they were already vested by the disentailing deed, should stand possessed of them upon trusts to correspond as nearly as might be to the uses of the freeholds. Under that settlement the seventh Earl became tenant for life, the eighth Earl became tenant for life in remainder, and other persons were entitled to the inheritance.

The seventh Earl died in the year 1897.

By the resettlement of August 15, 1889, power was given to the tenant for life for the time being to grant, limit, or appoint a yearly rent or yearly rents not exceeding in the whole for any one woman with whom he might marry the yearly sum of 2000*l.* to be charged upon and issuing and payable out of all or any of the settled hereditaments "free from all deductions." By an indenture of September 24, 1897, the eighth Earl in exercise of the power granted to and to the use of his wife Kate, Countess of Egmont, during her life a yearly rent-charge of 2000*l.* "free from all deductions." The eighth Earl died in 1910, and Kate, Lady Egmont, was his executrix. Charles John, ninth Earl of Egmont, was the present holder of the title and tenant for life of the estates and the heirlooms.

On the death in 1897 of the seventh Earl succession duty and estate duty became payable in respect of the heirlooms. These duties were not paid, and on the death of the eighth Earl in 1910

the Crown claimed both the duties and interest thereon. The trustees had in their hands investments representing capital moneys arising under the settlement, and also money representing rents accrued during the life of the eighth and the present Earls. They took out this summons asking—

(1.) That it might be determined how the estate duty and succession duty payable on the death of the seventh Earl in respect of the heirlooms and the interest on such duties respectively and the costs incurred by the plaintiffs in relation thereto ought to be borne, and that all necessary and proper directions might be given for the raising and payment of the said succession duties, interest, and costs. And in particular that it might be determined

(A) Whether the plaintiffs were at liberty to raise the amount of the duties and costs by the sale of investments representing capital moneys under the settlement or by the sale of the heirlooms or any of them ;

(B) Whether the plaintiffs were at liberty to retain the whole or any and what part of the interest which accrued due on the said duties during the lifetime of the eighth Earl out of moneys in their hands representing income which accrued during his life and was otherwise payable to the defendant Kate, Countess of Egmont, as his executrix ;

(C) Whether the plaintiffs were at liberty to retain the whole or any and what part of the interest which had accrued due on the said duties since the death of the eighth Earl out of the income of capital moneys which had accrued since that date.

(2.) That all necessary and proper directions might be given for the raising and payment of the estate duty payable on the death of the eighth Earl in respect of the heirlooms and the interest on such estate duty and the costs incurred by the plaintiffs in relation thereto. And in particular that it might be determined whether the plaintiffs were at liberty to raise the amount of the said estate duty and costs by the sale of investments representing capital moneys under the said indenture of settlement or by the sale of the heirlooms or any of them.

(3.) That it might be determined how the succession duty payable on the death of the eighth Earl in respect of the jointure

WARRINGTON J.
1911
EGMONT'S (EARL) SETTLED ESTATES, *In re.*
LEFROY *v.* EGMONT.

of 2000*l.* per annum charged in favour of the defendant Kate, Countess of Egmont, during her life free from all deductions and the costs incurred by the plaintiffs in relation thereto ought to be borne. And in particular that it might be determined whether the plaintiffs were at liberty to raise the amount of such succession duty and costs by the sale of investments representing capital moneys under the said indenture of settlement or by deducting the same from the said jointure or how otherwise.

T. H. Carson, K.C., and *Sargant*, for the trustees. The first question is how the duties in respect of the heirlooms and the interest thereon ought to be borne. The succession duty is governed by s. 32 of the Succession Duty Act, 1853, which incorporates various provisions of the Legacy Duty Act, 1796: Hanson's Death Duties, 6th ed. p. 741. It is not disputed that the trustees are the right persons to pay the duty and to pay it out of capital: *Attorney-General* v. *Bruce*. (1) By mistake it was not so paid, and interest on the amount is payable, and the real question now in dispute is who is liable to pay that interest. The trusts of this settlement have already been before the Court in *In re Earl of Egmont's Trusts*. (2)

Howard Wright, for the present Earl of Egmont. There is no ground on which the payment of the interest on the succession duty can be thrown upon my client. It would never have been payable if the trustees had not made default in payment of the duty. No interest ought to have accrued, and it was the duty of the late tenant for life to keep down any that did become payable. His estate ought to be charged with this liability: *In re Earl Howe's Settled Estates*. (3) The interest on the estate duty can be raised under s. 9, sub-s. 5, of the Finance Act, 1894.

H. Terrell, K.C., and *Bryan Farrer*, for the remaindermen. We adopt the contention of Lord Egmont as against the late tenant for life. Estate duty and any interest thereon are charged on the property by s. 9, sub-s. 5, of the Finance Act, 1894, and are a first charge on the corpus under s. 42 of the Succession Duty Act, 1853: Hanson's Death Duties, 6th ed. p. 760. A

(1) [1901] 2 K. B. 391. (2) [1908] 1 Ch. 821.
(3) [1903] 2 Ch. 69.

tenant for life cannot shift his liability to keep down interest from income to capital: *In re Earl Howe's Settled Estates.* (1)

Cave, K.C., and *Harman*, for Kate, Lady Egmont. A tenant for life of two different properties is not liable to pay out of the income of the one the interest on money charged on the other. The trustees are liable to pay the interest on the succession duty in this case; they are liable to the Crown, whereas in *In re Earl Howe's Settled Estates* (1) the tenant for life was liable. This settlement is one document, but it contains different settlements of land and chattels with different trustees. The heirlooms produce no income, and the principle of all the cases is that interest must be kept down out of income, not out of property which produces no income: *Syer* v. *Gladstone* (2); *In re Hotchkys* (3); *Frewen* v. *Law Life Assurance Society* (4); *In re Baron Kensington.* (5) We cannot be called upon to pay out of the income of land settled by one settlement charges on chattels settled by another settlement. Enjoyment of the heirlooms is not income. This question is not covered by your Lordship's previous decision in *In re Earl of Egmont's Trusts.* (6)

WARRINGTON J. I think it is quite clear that the succession duty was a charge upon the heirlooms; and, having regard to the decision in *Attorney-General* v. *Bruce* (7), it was payable by the trustees. The estate duty was also a charge upon the heirlooms and was also payable by the trustees. The trustees for some reason did not pay either the succession or estate duty, and on the death of the eighth Earl in 1910 the Crown claimed both these duties, and, of course, interest thereon. With regard to the payment of the duties, no question is raised that they are payable by the trustees out of capital moneys in their hands under the settlement, in other words, payable out of corpus. The dispute arises with regard to the interest. In the first place it is said the interest accruing during the life of the eighth Earl ought to have been paid out of the rents and profits of the estate and ought now to be paid out of certain moneys in the

(1) [1903] 2 Ch. 69, 78.
(2) (1885) 30 Ch. D. 614.
(3) (1886) 32 Ch. D. 408.
(4) [1896] 2 Ch. 511.
(5) [1902] 1 Ch. 203.
(6) [1908] 1 Ch. 821, 827.
(7) [1901] 2 K. B. 391.

WARRINGTON J.
1911
EGMONT'S (EARL) SETTLED ESTATES, *In re.*
LEFROY *v.* EGMONT.

hands of the trustees representing rents accrued during his life. On the other hand, it is contended by the executrix of the eighth Earl that, inasmuch as the heirlooms in respect of which the interest is payable produce no income and inasmuch as they were settled apart from the estate, the duty ought not to be paid out of his income derived from the rest of the estate; that the only claim which could be made upon him was that he was personally liable to pay the interest, and that on the authorities that claim cannot be supported. On the part of the present Earl it is said that no part of the interest ought to be paid either out of the income accruing in his lifetime or even out of the corpus of the estate, because the payment of interest arises from default, and that the consequences of that default ought to be cast upon those who were guilty of it. It is contended on behalf of the remaindermen that, whatever happens, no part of this interest ought to be paid out of the inheritance, but that the interest ought to be kept down by the successive tenants for life out of the income of the estate.

Now, in my opinion, the last contention is the correct one. There is no question about the general rule that successive tenants for life are liable to keep down the interest on charges upon the estate of which they are tenants for life. It is said on behalf of the executrix of the eighth Earl that that does not apply to this case, because this estate duty is a charge only upon the heirlooms and he is not entitled in respect of the heirlooms to any income, and, therefore, there is no income that can be taken to pay it. In my opinion, that is not a correct view of the facts. I think that on the authority of *In re Baron Kensington* (1) these family settlements must be regarded as one settlement of the estates and of the heirlooms. As was pointed out by Farwell J. in that case, the separation into separate witnessing parts of the part of the settlement dealing with the estate and dealing with the heirlooms is merely for conveyancing reasons owing to the different natures of the property, but substantially the parties deal with the various items of the property of different natures and, therefore, requiring different modes of conveyancing as if it was all one mass. I think that

(1) [1902] 1 Ch. 203, 208.

is the true view of these family settlements; the question arose precisely in *In re Baron Kensington* (1) in regard to a separate witnessing part dealing with leaseholds and settling leaseholds upon trusts corresponding with the uses of the freeholds. It seems to me exactly in point. I do not desire in any way to rely upon my own decision in *In re Earl of Egmont's Trusts* (2), but it has been pointed out that I made remarks in that case which express an opinion similar to that which I have formed in the present case. It is quite true that the question to be decided in that case was different, and I had there to ascertain the true nature of the obligation imposed by one of the provisions of the Trustee Act, 1893, relating to the payment of premiums on insurable property, but that does not affect my opinion. I think, therefore, so far as the main question is concerned, this duty being a charge upon the property, and the heirlooms and real estate being substantially settled together, that the interest on this particular charge was payable by the successive tenants for life out of the income to which they were entitled under that settlement; and, accordingly, that the trustees were entitled and ought now, out of the moneys in their hands representing the income accruing in the life of the eighth Earl, to pay the interest that became payable during his life.

Then with regard to the present Earl, I think the interest which has accrued during his lifetime ought to be kept down out of the income of the estate. The special point which he makes is that the default was not his; that the interest never would have become payable at all if the charge had been discharged. In support of his contention he relies upon the decision in *In re Earl Howe's Settled Estates* (3), but the facts of that case were quite different from those of the present case. In that case the tenant for life himself had been liable to pay the estate duty and he came asking that the duty and interest on it might be paid out of the estate. The Court of Appeal decided that he had shewn no reason why he should be paid out of corpus interest which he ought to have kept down himself. That was the whole of the decision in *In re Earl Howe's Settled Estates* (3) so far as

(1) [1902] 1 Ch. 203. (2) [1908] 1 Ch. 821.
(3) [1903] 2 Ch. 69.

WARRINGTON J.
1911
EGMONT'S (EARL) SETTLED ESTATES, *In re.*
LEFROY *v.* EGMONT.

it is material to the present case. In this case the duties were not payable by the tenant for life at all, but by the trustees. The trustees will have to pay the Crown the duty and the interest, and I think that interest will be "properly paid" under s. 9, sub-s. 5, of the Finance Act, 1894. The interest on both the succession duty and the estate duty must be paid out of the money representing income of the estate accruing during the lifetime of the two successive tenants for life.

T. H. Carson, K.C., and *Sargant*, for the trustees. The next question is out of what funds we are to pay the duties themselves. Estate duty is provided for by s. 9, sub-s. 5, of the Finance Act, 1894, but there is a question whether we can pay succession duty on the heirlooms out of capital moneys arising from other sources.

H. Terrell, K.C., and *Bryan Farrer*, for the remaindermen. By s. 21 of the Settled Land Act, 1882, capital moneys may be applied in the discharge of incumbrances on the settled property; and by s. 37 proceeds of sale of heirlooms are capital moneys. It has been held that proceeds of sale of heirlooms can be applied in payment off of a mortgage on land: *In re Lord Stafford's Settlement and Will* (1); Carson's Real Property Statutes, 2nd ed. p. 687, and cases there cited. It follows that capital money derived from the sale of settled land may be applied in discharging incumbrances on heirlooms included in the same settlement: s. 9, sub-s. 7, of the Finance Act, 1894.

WARRINGTON J. As to the estate duty there is no question, for under s. 9, sub-s. 5, of the Finance Act, 1894, it can be paid out of the capital moneys. With regard to the succession duty the question is more difficult, but as the proceeds of sale of heirlooms are applicable in the same way as capital moneys and can be used for discharging incumbrances on other parts of the property included in the settlement, I think the converse proposition must be true, and capital money raised under the Act from other parts of the settled property may be expended in discharging incumbrances on the heirlooms. The only alternative would be to sell some of the heirlooms; the money arising

(1) [1904] 2 Ch. 72.

from that sale would then form part of the capital moneys and be available for this purpose. I think, therefore, that the charge can be paid out of capital moneys.

T. H. Carson, K.C., and *Sargant*, for the trustees. The only remaining question is whether succession duty ought to be deducted from the jointure granted to the defendant Kate, Countess of Egmont, or whether she is protected by the words "free from all deductions."

Cave, K.C., and *Harman*, for Kate, Countess of Egmont. The jointure ought to be paid in full without deducting succession duty: *Floyer* v. *Bankes* (1); Davidson's Precedents in Conveyancing, 3rd ed. vol. iii. pt. 1, pp. 311—316; *In re Higgins* (2); Theobald's Law of Wills, 7th ed. p. 195; *In re Saunders* (3); *In re Parker-Jervis.* (4)

[They were stopped by the Court.]

H. Terrell, K.C., and *Bryan Farrer*, for the remaindermen. Succession duty is payable by the successor in respect of his succession; it is not like legacy duty, which is payable by the executor. It is a charge on the succession, and the successor is the only person liable to pay it. In the present case, beside the successor, the jointress is liable: Succession Duty Act, 1853, s. 44. The trustees have to pay the amount of the jointure to the jointress without deduction, and she pays succession duty out of it. This is a legal limitation; so the trustees, although the successors, are not liable; the jointress is the only person liable to pay the duty, and the trustees are not entitled to pay this debt for her: Hanson's Death Duties, 6th ed. p. 761, note 2.

Howard Wright, for Lord Egmont, supported the same contention.

WARRINGTON J. I think the whole question is one of construction, what is meant by the words "free from all deductions." If they mean free from all deductions in the way of charge in respect of tax or otherwise, then the jointress is right and succession duty ought to be paid in addition to the jointure. In

(1) (1863) 3 D. J. & S. 306.
(2) (1885) 29 Ch. D. 697; affirmed 31 Ch. D. 142.
(3) [1898] 1 Ch. 17.
(4) [1898] 2 Ch. 642.

WARRINGTON J.

1911

EGMONT'S (EARL) SETTLED ESTATES, *In re.*

LEFROY v. EGMONT.

other words, the question is, in my mind, whether according to the true construction of this settlement the case falls within the decision in *Floyer* v. *Bankes* (1); in which, no doubt, the expression was expanded, so that the question of construction which does arise here did not arise. None the less, it is, in my opinion, a question of construction and a question of construction only.

Now the power in the resettlement was for the tenant for life to grant, limit, or appoint a yearly rent or yearly rents not exceeding in the whole for any one woman with whom he might marry the yearly sum of 2000*l.* to be charged upon and issuing and payable out of all or any of the settled hereditaments "free from all deductions," and by an indenture of September 24, 1897, the eighth Earl in exercise of the power granted to and to the use of his wife, the defendant Kate, Countess of Egmont, during her life a yearly rent-charge of 2000*l.* "free from all deductions." The concrete question is whether those words "free from all deductions" include free from deduction in respect of succession duty. Succession duty is a first charge under s. 42 of the Succession Duty Act, 1853, upon the interest of the successor. It is a first charge, therefore, upon the jointure or sum of 2000*l.*, and it is a deduction from it, resulting no doubt from the imposition of the tax, but resulting in a deduction from the yearly sum of 2000*l.* That sum is to be charged upon and payable out of the hereditaments "free from all deductions." If the succession duty is a deduction from the rent-charge of 2000*l.*, then it seems to me that, if the rent-charge is payable and the jointress has to pay the succession duty, she does not get her rent-charge "free from all deductions." The settlors here have done what has been done in many cases of legacies, they have charged, or enabled the tenant for life to charge, the estates with a jointure of 2000*l.* and with such further sum as is necessary to pay the succession duty on that jointure. Therefore the succession duty must in this case, according to the true construction of this settlement, be paid out of the capital moneys.

Solicitors: *Littledale & Lefroy; Morley, Shirreff & Co.; Arnold & Henry White; Cann & Son.*

(1) 3 D. J. & S. 306.

H. C. R.

WARRINGTON J.

1911

Nov. 16, 20, 21.

In re SOLOMON.
NORE *v.* MEYER.

[1910 S. 222.]

Trustee—Investment—Mortgage—Breach of Trust—Insufficient Security—Property let on Weekly Tenancies—Duty of Trustees to inquire as to nature of property and financial position of Mortgagor—Valuer, Employment of—Duty of Trustees to inquire as to previous Dealings with Mortgagor—Duties of Valuer—Remuneration—"Two-thirds" Limit—Form of Report—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *s.* 8, *sub-s.* 1.

By the Trustee Act, 1893, trustees lending trust moneys on the security of property on which they can lawfully lend are relieved from the burden formerly cast upon them by the Court of investigating for themselves the nature and circumstances connected with the security and the financial position of the borrower, and are justified in assuming that the surveyor or valuer employed by them under sub-s. 1 of s. 8 of the Act of 1893 to report as to the value of the property and to advise them as to lending money on it will ascertain for himself all the facts necessary to enable him to make a proper report.

Trustees who by their trust are authorized to lend trust moneys on the security of leasehold property are entitled to lend it on the security of leasehold cottage property let on weekly tenancies, but the amount which they may safely lend on such property must depend upon the circumstances of each particular case.

The words "instructed and employed independently of any owner of the property" in sub-s. 1 of s. 8 mean that the relation of employer and employee must exist between the trustees and the surveyor or valuer and between them alone. The surveyor or valuer must be entitled to look for payment of his remuneration to the trustees alone, and must be responsible to them alone for the due performance of his duty. He must be instructed and employed by the trustees in the particular matter independently of the mortgagor, but it is not incumbent on the trustees before employing him to inquire into his previous business transactions with a view of ascertaining whether at any time near or remote he has acted for or advised the mortgagor.

It is the duty of surveyors and valuers in advising trustees as to lending trust moneys to state in their report not only what they consider to be the actual value of the property offered as security, but also what proportion of that value the trustees may safely advance upon the security quite irrespective of any supposed rule as to the two-thirds limit, subject only to this, that if they are so satisfied as to the importance of the security as to advise them to advance more than two-thirds of the value, the trustees would not be justified in acting on that advice

WARRINGTON J.

1911

SOLOMON, *In re.* NORE v. MEYER.

inasmuch as if they did so they would exceed the limit prescribed by sub-s. 1 of s. 8.

Where a surveyor or valuer is employed by trustees to value and report upon property it is not essential for him, in order to comply with sub-s. 1 of s. 8, in so many words to state in his report that he advises the trustees to advance a specified sum of money; it is sufficient if he states what he considers to be the value of the property and that it forms a sufficient security for the sum named by him.

WITNESS ACTION.

Abraham Hammond Solomon by his will, dated January 13, 1886, appointed the defendants Arthur Selwyn and Julius Meyer Meyer and Frederick Hyman Lewis executors thereof and bequeathed to his sister, the plaintiff Miriam Noah Nore, a legacy of 10,000*l.* And the testator declared that the trustees or trustee for the time being of his will should retain the legacy and invest it in or upon any of the modes of investment thereinafter authorized, with power to vary the same investments at their or his discretion, and should pay the income to arise from such investment to his said sister during her life for her separate use without power of anticipation, and from and after her decease should stand possessed of the legacy and the investments thereof in trust for his three nieces, the plaintiffs Florence Elizabeth Booth, Minnie Turner, and Eva Estelle de Fleury, the children of his said sister, as therein mentioned. And he directed that all moneys to be invested under his will might be invested in or upon (inter alia) real or leasehold houses or land in England or Wales, but not elsewhere, such leasehold securities being held for a term or terms whereof fifty years at least should be unexpired at the time of such investment.

The testator died on March 24, 1888, and his will was duly proved by the defendants Meyer and A. Selwyn alone, F. H. Lewis having renounced probate.

In February, 1904, the defendants Meyer and A. Selwyn advanced the sum of 5636*l.* 16*s.*, part of the money held by them on trust to answer the legacy of 10,000*l.*, together with a further sum of 1363*l.* 4*s.*, other moneys in which the plaintiffs were not interested, making together a total sum of 7000*l.*, to A. E. B. Crundall upon the security of mortgages of—

(*a*) Two pairs of semi-detached freehold houses in Cromer

Road, Holt, in the county of Norfolk, known as Volwood, Valewood, Pinewood, and Briarwood, upon which 1200*l.* was advanced.

(*b*) The freehold and leasehold interest in seven messuages formerly known as Nos. 1 to 7, Bensham Gardens, and now known as Nos. 16, 18, 20, 22, 24, 26 and 28, Broad Green Avenue, Croydon, upon which 3700*l.* was advanced.

(*c*) Twenty-three leasehold messuages formerly known as Nos. 1 to 12 and 15 to 25, Crundall Villas, and now known as Nos. 1 to 23 (odd numbers) and 29 to 49 (odd numbers), York Road, Teddington, upon which 2100*l.* was advanced.

The 7000*l.* was advanced by the defendants Meyer and A. Selwyn upon a report of Messrs. Toplis & Harding, a firm of auctioneers and surveyors, dated February 22, 1904, under circumstances which are fully stated in the judgment of Warrington J. The instructions for the report were prepared by the defendants' solicitors and were never seen by the defendants themselves.

On May 5, 1904, the defendant Gerald Mere Mere was appointed a new trustee of the will in the place of the defendant A. Selwyn, who retired.

On June 21, 1906, a receiving order was made against Crundall, and he was subsequently adjudicated a bankrupt.

On January 20, 1910, the plaintiffs commenced the present action against the defendants, claiming (inter alia) (1.) a declaration that the investment of the 7000*l.* above mentioned and the retention thereof was a breach of trust, and that the defendants might be ordered to make good all loss occasioned thereby and by their neglect of the mortgaged property, and (2.) an account and inquiry with respect to the legacy of 10,000*l.*

The plaintiffs by their statement of claim alleged that all the houses in question were improper securities for the investment of trust moneys; that they had all been built or were in course of being built by Crundall, and at the time of the investment were not all finished or let, and they were all of an extremely speculative character; that in particular (*a*) the houses in Holt were small villa residences for which there was little or no demand; (*b*) the messuages in Croydon were wholly unsuited to

WARRINGTON J.
1911
SOLOMON, *In re.* NORE *v.* MEYER.

the neighbourhood where they were erected, which neighbourhood was well known to have been falling in value for some years before 1904, and the same were liable to heavy outgoings; (*c*) the messuages in Teddington were held upon weekly tenancies in a very poor neighbourhood and were liable to heavy outgoings. They further alleged that in making the investment the defendants were not acting upon a report as to the value of the properties made by a person whom they reasonably believed to be an able practical surveyor; that Messrs. Toplis & Harding, upon whose report the defendants acted, were not instructed independently of Crundall, the owner of the properties, and were interested in their report being acted upon; that the report was in itself unsatisfactory, and that if the defendants had properly considered it they would have seen from it that the properties therein described were not securities upon which trust moneys ought to be invested; and that the defendants did not personally consider the report, but left the matter entirely in the hands of their solicitors, who had selected Messrs. Toplis & Harding to make the report. They also alleged that the defendants had not proved in the bankruptcy of Crundall for the moneys advanced by them, although the security for the same was insufficient; that they might have sold the houses in Croydon and Teddington in 1906 for sums considerably in excess of the price which they would now obtain for them; and that they had been guilty of a breach of trust not only in taking the mortgages but in omitting to realize the same and in neglecting to keep the houses in a proper state of repair.

The defendants by their defence denied that the houses were improper securities for the investment of trust moneys or that they were of a speculative character. They alleged that Messrs. Toplis & Harding were instructed and employed wholly independently of Crundall; that the amounts advanced did not exceed two equal third parts of the value of the properties as stated in their report; and that the loan was made under the advice of Messrs. Toplis & Harding expressed in such report. They denied that Messrs. Toplis & Harding were interested in their report being acted upon, and that it was in itself unsatisfactory or disclosed that the properties were not proper securities for

the investment of trust moneys, and that the defendants Meyer and A. Selwyn did not consider the report or the propriety of the investment. They admitted that there would be a loss on the mortgages, but pleaded that they had since Crundall's bankruptcy done their best to realize the properties and prevent or minimize the loss. They also submitted that they had acted reasonably and honestly, and pleaded the Judicial Trustee Act, 1896, if they had in fact committed any breach of trust.

The defendant A. Selwyn died on January 13, 1911, having by his will appointed the defendant Lilly Allen Selwyn his executrix, and by an order dated April 28, 1911, it was ordered that the proceedings should be carried on by the plaintiffs against the defendants Meyer and Mere and the defendant L. A. Selwyn.

The defendant L. A. Selwyn by her defence adopted the defence of the three original defendants.

Cave, K.C., *Percy Wheeler*, and *Gilbert Stone*, for the plaintiffs. The defendants have committed breaches of trust by making and retaining improper investments. Under sub-s. 1 of s. 8 of the Trustee Act, 1893 (1), a trustee is not chargeable for breach of trust "by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made," but he may be charged on other grounds. He must still shew that the security was property on which he could lawfully lend, and that he "was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed

(1.) The Trustee Act, 1893, s. 8, sub-s. (1.): "A trustee lending money on the security of any property on which he can lawfully lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the Court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report."

WARRINGTON J.
1911
SOLOMON, *In re.*
NORE *v.* MEYER.

independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report." The defendants ought not to have lent money on this security at all; they did not obtain a satisfactory valuation, nor did they get sufficient information about the property. Leasehold cottage property let on weekly rents is not such a security as trustees ought to accept. Messrs. Toplis & Harding were not employed independently of the owner; they were also acting for the mortgagor. They had an interest in valuing the property as highly as possible, for their fees depended on the mortgage going through: *Marquis of Salisbury* v. *Keymer*. (1) The instructions given to them were to the effect that they should value the property at a high price and they have simply adopted the instructions. They made no inquiries about the position of the mortgagor, outgoings, means of communication, neighbourhood, or any other surrounding circumstances, and the trustees simply accepted their report, which gave them no information on these points. The omission of the trustees to make inquiries was a breach of trust against which they are not protected by sub-s. 1 of s. 8: *In re Somerset*. (2) That case also shews that the words "instructed and employed" are not governed by the expression "believed to be." The defendants should have exercised more care in the selection of a valuer: *Fry* v. *Tapson*. (3) Trustees are still bound to take into consideration the nature of the property: *Shaw* v. *Cates* (4); *Smethurst* v. *Hastings*. (5) If they had inquired about the condition of the property they would have discovered that it was in bad condition and not a proper security for trustees, and they should have instructed the surveyors to value for an investment of trust money: *In re Olive* (6); *In re Partington*. (7)

(1) [1909] W. N. 31.
(2) [1894] 1 Ch. 231, 248.
(3) (1884) 28 Ch. D. 268, 279.
(4) [1909] 1 Ch. 389, 405.
(5) (1885) 30 Ch. D. 490, 498.
(6) (1886) 34 Ch. D. 70, 73.
(7) (1887) 57 L. T. 654.

Formerly trustees had to form a judgment on all these questions for themselves, including the question of value: *Learoyd* v. *Whiteley* (1); *In re Salmon.* (2) By s. 4 of the Trustee Act, 1888, re-enacted in s. 8 of the Trustee Act, 1893, trustees who act on a proper valuation are relieved from forming an opinion on the question of value, but on that question only: *Blyth* v. *Fladgate* (3); *In re Turner* (4); *In re Stuart* (5); *In re Dive* (6); *Shaw* v. *Cates* (7); *Palmer* v. *Emerson.* (8)

H. Terrell, K.C., Buckmaster, K.C., and *Lyttelton Chubb,* for the defendants Meyer and Mere. No case is suggested against the trustees personally. They are honest men and the only question is whether they have acted reasonably. They rely on the report of the surveyors. Sect. 4 of the Trustee Act, 1888, and s. 8 of the Trustee Act, 1893, were passed for the protection of trustees in this position. It was recognized that the duty cast upon them was more than they could reasonably discharge; they were expected to go and inspect the property for themselves and form their own opinion of the security: *Learoyd* v. *Whiteley.* (1) Under the Trustee Acts, 1888 and 1893, provided the security be authorized by the terms of their trust, they are now protected if a competent surveyor says they may invest on the security up to a certain amount and they act on his advice. The only question they have to decide for themselves is whether or not it is an authorized security. The decision to the contrary in *Shaw* v. *Cates* (7) is erroneous and ought not to be followed. Valuers are not at liberty to recommend an advance of two-thirds of the value in every case; they have to take all the circumstances into consideration, and if they do not do so they may be sued for negligence. The duty of making inquiries is now put on the surveyor. Every point that has been suggested except the question whether the property is an authorized security, relates to value. The cases which have been cited shew that when once the property is shewn to be within the

(1) (1887) 12 App. Cas. 727, 732.
(2) (1889) 42 Ch. D. 351, 368.
(3) [1891] 1 Ch. 337.
(4) [1897] 1 Ch. 536.
(5) [1897] 2 Ch. 583.
(6) [1909] 1 Ch. 328.
(7) [1909] 1 Ch. 389.
(8) [1911] 1 Ch. 758.

WARRINGTON J.

1911

SOLOMON, *In re.* NORE *v.* MEYER.

ambit of the trust the only question is value. Under s. 8 of the Act of 1893 it is sufficient if the trustee believes that the valuer is "instructed and employed independently." It cannot be that a trustee can lose the protection of the section through something which is beyond his knowledge. In *In re Somerset* (1) the trustee knew that the valuer was not independent. There is no doubt here that the trustees believe that Messrs. Toplis & Harding were independent. Trustees are not bound, before sending instructions for a valuation through their solicitors, to first satisfy themselves that the valuer they propose to employ has never acted in any previous transaction for the mortgagor. It is the duty of the valuer and not of the trustees to ascertain and consider all the circumstances connected with the property which are likely to affect its value. Here the security was advised by the valuers. The trustees acted on that advice and are therefore protected by s. 8.

Clauson, K.C., and *J. Israel*, for the defendant Mrs. Selwyn, adopted the same argument.

Cave, K.C., in reply. In order that that report should operate as a protection the defendants must shew, amongst other things, that the loan was made under the advice of the surveyor or valuer expressed in the report. Here that was not the case. Messrs. Toplis & Harding did not in their report advise the loan. Sub-s. 1 of s. 8 means that the surveyor or valuer must take upon himself the responsibility of advising the trustees to make the loan. It is not enough for him merely to state that the property is a sufficient security for the amount proposed to be lent. Further, not only must the surveyor or valuer employed be a person whom the trustees reasonably believed to be an able practical surveyor or valuer, but he must in fact be instructed and employed independently of any owner of the property. The words "believed to be" in the sub-section do not govern the words "instructed and employed independently of any owner of the property": *In re Somerset* (2); *In re Walker*. (3) The word "independently" in the sub-section means having no interest in the matter going through. Here it is consistent with the

(1) [1894] 1 Ch. 231. (2) [1894] 1 Ch. 253.
(3) (1890) 59 L. J. (Ch.) 386, 391.

evidence given that Messrs. Toplis & Harding were Crundall's own surveyors. The whole transaction shews that they were interested in getting the matter through and were not in a position to give independent advice: *In re Dive.* (1) It is the duty of surveyors to advise their clients quite irrespective of whether the matter is likely to go through or not: *Marquis of Salisbury* v. *Keymer.* (2)

Apart from the question of valuation, the sub-section does not relieve trustees from the obligation of obtaining information as to relevant facts connected with the property before the valuation or the loan is made. Here the trustees made no inquiries as to the solvency of Crundall. In *In re Somerset* (3) the question as to the solvency of the borrower was treated as a very important matter for the consideration of trustees lending money. It is obviously desirable and better for the cestuis que trust that the mortgagor should pay the mortgage debt when it becomes due than that the trustees should have to sue him for it with the consequent delay. Further, the trustees must ascertain either for themselves or through their agents the nature of the property on which they are asked to lend money—whether it is freehold or leasehold, and if the latter, what is the ground rent, and what are the outgoings—and they are not performing their duty if they do not do so. Here if the trustees had ascertained that the outgoings exceeded one-third of the income of the property they would not as prudent men have made the advance. Information ought also to have been obtained by the trustees as to tenancies. Leasehold property let on weekly tenancies in a place like Croydon is not property on which trustees ought to invest trust money. This is an objection to the nature of the property and not merely as to its value.

Further, the instructions given for the report must be proper instructions if the trustees desire to rely on it: *In re Partington* (4); *Shaw* v. *Cates.* (5) Here the trustees never saw or asked to see the instructions. They left the whole matter to their solicitors.

(1) [1909] 1 Ch. 328, 343.
(2) [1909] W. N. 31.
(3) [1894] 1 Ch. 231, 247.
(4) 57 L. T. 654.
(5) [1909] 1 Ch. 389, 401, 404.

WARRINGTON J. 1911 SOLOMON, *In re.* NORE *v.* MEYER.

WARRINGTON J. The plaintiffs in this case are beneficially interested in a legacy of 10,000*l.* bequeathed by the will of Abraham Hammond Solomon. The defendant Meyer and the defendant A. Selwyn (who has died since the commencement of this action) were the trustees of the will before and after April 26, 1904. The defendant Mere was appointed a new trustee of the will on May 5, 1904, upon the retirement of the defendant A. Selwyn.

The plaintiffs claim to make the two trustees, the defendants Meyer and A. Selwyn, responsible for the loss which has arisen in consequence of an investment by them of a sum of between 5000*l.* and 6000*l.*, part of the legacy of 10,000*l.*, upon a security which has proved, or is likely to prove, insufficient. They further charge the defendant Meyer and the defendant Mere with default and breach of trust in not having taken the proper steps to realize the investment and to minimize the loss. With regard to the latter point, I think I may dismiss that at once. I have no evidence on which it would be possible to charge the defendants Meyer and Mere with any breach of trust in connection with the retention or non-realization of the investment. On that point the defendants are, I think, entitled to succeed, and I will therefore confine what I have to say to the charge of breach of trust connected with the original investment.

The defence of the two trustees is based entirely upon sub-s. 1 of s. 8 of the Trustee Act, 1893, and it is really not seriously disputed that, but for that sub-section, the plaintiffs would be entitled to relief. [His Lordship read the sub-section down to the words "at the time when the loan was made," and continued:] So far, it is an absolute negation of any claim for a breach of trust by reason only of the matters mentioned in the section. [He then read the remainder of the section, and continued:] I will come back to that part of the sub-section presently; for the moment I propose only to state the grounds on which the plaintiffs say the sub-section is not available for the defence of the trustees. In the first place, the plaintiffs contend that it is not sought to charge the trustees here with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property, but to charge them with breach of

trust by reason of certain circumstances other than the proportion of the loan to the value of the property. Secondly, they say that the trustees have not here satisfied the condition contained in the second part of the sub-section, and have not made it appear to the Court that, in making the loan, they were acting upon the report of such a person as is mentioned in the sub-section; and further, that the loan was not made under the advice of the surveyor or valuer expressed in the report. Those, I think, in general terms, are the points raised by the plaintiffs against the contention of the trustees.

Now, before I come to the facts, I think I ought to say this It has been recognized in several cases, and amongst them I will only mention the case of *In re Stuart* (1) before Stirling J., that this provision in the Trustee Act, 1893, following as it did the provision in the previous Act of 1888, was intended to relieve trustees from a burden previously cast upon them by the Court, and which the Legislature conceived was too heavy a burden to be cast upon them, in other words, that the Act was intended to be a relieving Act, and as such Act, it ought to be construed liberally in favour of the persons whom it is sought to relieve, and adopting in effect what was said by Jessel M.R. in *In re Speight* (2), I think the Court ought not to be astute to find means of excluding trustees from the relief which the Legislature has thought ought to be extended to them.

I now come to the facts of this case. The testator died in 1888, and by his will, which was made in 1886, amongst other bequests, he bequeathed to his trustees a sum of 10,000*l.* upon certain trusts, under which, as I have already said, the plaintiffs are beneficially interested, and he directed that all moneys to be invested under the will might be invested in certain securities including (and this alone is material for the present purpose) freehold or leasehold houses or land in England or Wales, but not elsewhere, such leasehold securities being held for a term or terms whereof fifty years at least should be unexpired at the time of such investment. From the death of the testator in 1888 until 1904, in which year the present investment was made, the trustees had frequently made investments upon mortgage.

(1) [1897] 2 Ch. 583. (2) (1883) 22 Ch. D. 727, 746.

WARRINGTON J.
1911
SOLOMON, *In re.*
NORE *v.* MEYER.

The solicitors who had always attended to the business of the trustees were Messrs. Farrar, Porter & Co. In the first instance, Mr. Farrar personally attended to the business, and after his death Mr. Porter took his place. Not only did the trustees, as trustees, frequently make investments on mortgage with the assistance of Messrs. Farrar, Porter & Co. as their solicitors, but the defendant Meyer personally invested moneys of his own in the same way, employing Messrs. Farrar, Porter & Co. as his solicitors. The valuers (who, from the death of the testator until after the matters in this action took place, were employed through Messrs. Farrar, Porter & Co. to advise the trustees and to advise the defendant Meyer personally) were a well-known firm of valuers of high reputation, Messrs. Toplis & Harding, and the individual member of the firm who attended to the business was Mr. Harding, who is now dead. In the latter part of the year 1903 the trustees had a sum of 7000*l.* out on mortgage on certain property at Croydon belonging to one Crundall. That 7000*l.* consisted partly of moneys forming part of the 10,000*l.* legacy, and partly of other moneys subject to the trusts of the will in which the defendant A. Selwyn, the deceased trustee, was beneficially interested. In the latter part of 1903 Crundall had occasion to shift his securities. What his reason for desiring to do so was is, in my judgment, immaterial to the present case. He communicated his desire to Mr. Porter, and Mr. Porter informed the defendant Meyer that Crundall desired to discharge the Croydon Theatre property mortgage for 7000*l.*, and to substitute for that security other property belonging to himself. Mr. Porter gave to the defendant Meyer on that occasion some particulars of the property which Crundall desired to substitute, and the view taken by the defendant Meyer, and the instructions he gave to Mr. Porter, were that he would be content to fall in with Crundall's desire, provided that Mr. Harding, who had, as I have said, always hitherto advised the trustees, valued the property and made a report upon which they could act. In the first instance Mr. Harding was requested to make a preliminary report, and for that report Crundall promised to pay him his fee of six guineas. I do not think anything can be made of that circumstance. The preliminary

report was intended to be, and I think quite rightly intended to be, no more than this—to satisfy the parties concerned that the proposed transaction was one which might be entertained by the trustees, because obviously it would be unwise to incur the expense of a formal valuation unless there were, at any rate, some prospect that the trustees would consent to lend the money. Mr. Harding accordingly made a preliminary report; it was communicated to the defendants Meyer and A. Selwyn, and was considered sufficiently satisfactory to justify them in proceeding with the matter. Accordingly, Mr. Porter, acting as solicitor for the defendants, instructed Mr. Harding to make a formal report, and here I must just allude to one matter on which a good deal has been said. It has been contended by the plaintiffs that Messrs. Farrar, Porter & Co. were the solicitors for Crundall as well as for the trustees, and reliance was placed upon certain expressions in the correspondence which indicate that, at all events, they were in communication with Crundall in connection with this matter, and that they were in some matters at all events acting as his solicitors. In my opinion they were not acting as his solicitors, so far as the evidence before me goes, in the matter of this mortgage, and the correspondence shews to me quite plainly that Messrs. Farrar, Porter & Co., so far as the business of solicitors in connection with this mortgage was concerned, did their duty. They investigated the title and they investigated it as strictly as any solicitor, acting on behalf of his clients, would investigate, and no charge, I think, is or can be made against Messrs. Farrar, Porter & Co. that they were not acting in this matter properly on behalf of their clients, the trustees, who had employed them. Now they instructed the valuers to make the report, and a great deal is made of those instructions. They are dated February 12, 1904, and so far as material are in these terms: "The several freehold and leasehold properties set out below have been offered to clients of ours who are trustees as security for an advance of 7000*l.* Messrs. Toplis & Harding will please survey the various properties and report what in their opinion is the value of the security offered and what amount can be advanced by trustees thereon." Those are the instructions, and, in my opinion, they convey to Messrs.

WARRINGTON J.
1911
SOLOMON, *In re.* NORE *v.* MEYER.

Toplis & Harding this—that the security has been offered to the trustees; that subject to the report as to their value and the amount which can be advanced by the trustees, the trustees are minded to accept the offer made to them; for what other object could there be in asking for this report by the surveyors? But those are the instructions. Appended to the instructions are certain particulars with reference to the property which they are to survey and on which they are to report. The property is divided into three parts. First there are four freehold houses at Holt in Norfolk. The instructions inform the valuer of the rent of those houses and of the fact that the tenant is paying rates and taxes, but give no other information except the information sufficient for the valuer to identify the property, and having surveyed it, as he is instructed to do, to report on its value, taking into account, of course, all the circumstances which as an expert he knows will affect its value. With regard to the next lot of property, that consists of the freehold and leasehold interest—in effect, therefore, the freehold interest—in seven houses at West Croydon, and again in this case particulars are given as to the rent and the terms of the agreement of tenancy in each case, one of the houses being vacant and the rent being put down as "50*l.* (estimated)." In this case the instructions make no allusion to the rates and taxes—they do not say by whom they are paid. The next batch of property consists of "23 houses known as Nos. 1—12 and 15—25, Crundall Villas, York Road, Teddington. Leases about 96 years at a ground rent of 4*l.* each. Let at 8*s.* per week except No. 8 which is let at 9*s.* Landlord pays rates," &c. Those are the instructions which are given to the valuer, and it is said that those instructions are in themselves insufficient. That, in my opinion, is a misapprehension. I agree with what Parker J. said in *Shaw* v. *Cates* (1), that it is the business of the expert to determine what are the facts and circumstances connected with the property which it is necessary for him to take into account in arriving at his valuation, and it will be properly assumed that, when the expert is directed to report on the value of the property, he will discover for himself those circumstances which bear on its value

(1) [1909] 1 Ch. 389, 398.

and will make his valuation in accordance with those circumstances. In my judgment it is, for obvious reasons, desirable that that should be the course pursued; otherwise the inexpert person may point out in the instructions to the valuer certain things which, in his inexpert opinion, may bear on the value of the property, and may omit to mention circumstances which in the opinion of an expert would be of great importance in determining that value. I think it is much better that the inexpert person should leave it to the expert to determine what circumstances ought to be taken into account, and to satisfy himself that he obtains the necessary information with regard to those circumstances. Having received those instructions, Messrs. Toplis & Harding make their report ten days later. It is dated February 22, 1904, and in it they state: "In accordance with your instructions we have surveyed the following freehold and leasehold properties, proposed as security for the advance of 7000*l.* by way of mortgage"—that is to say, they inform the trustees that they have complied with the first of the instructions which had been conveyed to them, namely, to survey the property. Then they proceed to give particulars of the nature of the four freehold houses at Holt, particulars which I need not read, and they say with regard to their tenancies: "Three of the houses are let as we are informed at 81*l.* 10*s.* per annum, the other at 27*l.* 10*s.* per annum, tenants paying rates and taxes. We value the freehold at 1800*l.*, and consider that it is sufficient security for the advance of 1200*l.* by way of mortgage by trustees." They do not in the report give any further information to the trustees as to the situation or the other circumstances which they have taken into account in arriving at the value they put upon it. Then they proceed to deal with the Croydon property, and they again give particulars of the houses themselves and their contents, and they go on to say: "The property is let we are informed with one exception on yearly and three years agreements, and produces, actual and estimated, 362*l.* 10*s.* per annum, tenants paying rates and taxes. We value this freehold and leasehold interest at 5600*l.*, and consider that it is sufficient security for the advance of 3700*l.* by way of mortgage by trustees." In this case it is obvious that the valuers must have obtained from some one further information

WARRINGTON J.
1911
SOLOMON, *In re.*
NORE *v.* MEYER.

regarding the tenancies of the houses than was contained in the particulars sent to them with the instructions, because they state, in this case, "tenants paying rates and taxes," a fact which is not referred to in those particulars. Then they go on to deal with the third part: "twenty-three leasehold houses known as Nos. 1 to 12 and 15 to 25, Crundall Villas, York Road, Teddington. Let to weekly tenants and producing 481*l.* per annum. Landlord paying rates, taxes and all outgoings. The property is held for an unexpired term of ninety-six years at a ground rent of 92*l.* per annum." They go on to say: "We value this leasehold property at 3220*l.* and consider that it is sufficient security for the advance of 2100*l.* by way of mortgage by trustees." In that case also they do not state any of the circumstances on which they base their valuation, nor the mode in which the valuation has been arrived at. They conclude their report with this sentence: "We are of opinion that these three properties are of the value of 10,620*l.* in all and form sufficient security for the advance of 7000*l.* on mortgage by trustees." That report, when received, was considered first by the defendant Meyer; he saw it at Mr. Porter's office, and he read it and considered it, and was, so far as he was concerned, willing to act on it and make the advance required. A copy of it was sent to the defendant A. Selwyn, the other trustee, for his consideration, and he returned it with a letter assenting to the advance, and expressing his willingness to act upon the report. The matter then went through, and was carried out by the execution of four documents amounting, in effect, to a consolidated mortgage of the three properties to the trustees for a total sum of 7000*l.* They were in fact separate mortgages, the amounts being stated to be advanced on each of the three properties, but they each contained a proviso that the restriction on the right of consolidating mortgage securities contained in s. 17 of the Conveyancing and Law of Property Act, 1881, should not apply to that security. They are therefore for all purposes to be treated as one mortgage for 7000*l.* These mortgages were all dated April 26, 1904, and the defendant A. Selwyn retired a few days later on, and, as I have already mentioned, a new trustee, the defendant Mere, was appointed.

In 1906 Crundall, the mortgagor, became bankrupt. In the meanwhile he had created second mortgages on these properties in favour of the Capital and Counties Bank. On his becoming bankrupt, the bank appointed a receiver, and for two years they paid the interest on the first mortgage to the trustees. They put up the properties for sale. Before doing so they arranged with the trustees as to the reserve prices which should be put upon the several properties, and, for the purpose of enabling them to determine whether they would assent to those proposed reserve prices, the trustees took the advice, in the one case of a local surveyor in Norfolk, in the other case of Messrs. Toplis & Harding. In the case of the Holt property, they consented to a reserve price of 500*l.* on each block of two houses, the houses being semi-detached. The houses were sold at that reserve price, and a sum of 1000*l.* was paid to the trustees in part discharge of their first mortgage; the other properties were not sold. In 1908 the Capital and Counties Bank ceased to pay the interest to the first mortgagees, and the trustees themselves appointed their own receiver of the remaining properties, the Croydon and the Teddington properties. It seems almost certain—one may say quite certain—that there will be a serious loss in consequence of this investment, and it is in respect of that loss that the plaintiffs seek to charge the defendant Meyer and the estate of the defendant A. Selwyn.

Now, the plaintiffs charge the two trustees with certain acts of negligence in making the investment. They say, in the first place, that they neglected to take into consideration the personality of the mortgagor. The mortgagor, Crundall, was a man who speculated to a considerable extent in house property, and property of that nature, and in 1900, when the defendant Meyer was proposing, or had been asked, to make an advance to Crundall on his own account, the defendant Meyer had made certain inquiries of his bankers, and of well-known inquiry agents, as to Crundall's circumstances, and the information he obtained was sufficiently reassuring to determine him to make that advance then in contemplation; he did not make any further inquiries as to Crundall's position in 1904. The trustees are also charged with not having themselves ascertained or made

WARRINGTON J.
1911
SOLOMON, *In re.* NORE *v.* MEYER.

inquiries as to the details regarding the nature of the property, the amount of the outgoings, or the circumstances attending the tenancies of the various properties, all which matters, if the trustees had known the facts, might have deterred them from making the advance, or making so large an advance as they did.

Now, with reference to that matter, I think that, before the Act, it would have been the duty of the trustees to satisfy themselves as regards all those matters, and, as I have already said, it is hardly contended on the part of the defendants that, but for the Act, they would not, in these respects, have been guilty of negligence, the consequences of which might have been visited upon them. But, since the Act, I think the trustees are in a very different position, and that they are justified now, as Parker J. said (as I have already remarked) in *Shaw* v. *Cates* (1), in assuming that the valuer, whose duty it is to advise them, will satisfy himself of the facts which are necessary in order to enable him to make a proper valuation, and that the trustees are therefore relieved from that part of the burden which was cast upon them by the Court before the Act was passed, if of course they came within the Act.

The plaintiffs also say that the trustees gave to the valuers insufficient instructions. I really fail to see how these instructions were insufficient. The essence of the instructions was that the valuers were to survey and report on the value, and that was sufficient to compel them, if they were to do their duty, to report only after having ascertained the circumstances which would bear upon the question of the value of the property on which they were asked to report.

There is one other matter to which I have to refer before I come to consider how the law ought to be applied, and that is the mode in which the valuers were employed and remunerated. The facts with regard to this appear in answer to one of the plaintiffs' interrogatories made by the defendant Meyer, and put in by the plaintiffs as part of their case. From that it appears, first, that the valuers were to be remunerated by a percentage based upon the amount advised by them to be lent upon the security; secondly, that, as between the trustees and the valuers, the

(1) [1909] 1 Ch. 389, 398.

trustees were liable to pay the fee to the valuers, and I think, taking the evidence of the defendant Meyer, that the valuers were instructed and employed by the trustees.

I now come to consider what, on these facts, is the law which is to be applied. The first part of sub-s. 1 provides, as I have already mentioned, that a trustee, lending money on the security of any property on which he can lawfully lend, shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made.

Now, the first point made by the plaintiffs is that, so far as regards the Teddington property, that was not property on which the trustees could lawfully lend; their argument goes as far as that. They say that so unsatisfactory, so troublesome, and so liable to fluctuation in value is weekly property, that trustees ought not to lend on it at all. That contention, in my opinion, cannot be sustained. It is, and must be in every case, a question of the amount which a trustee may safely lend. It surely could not be contended, for example, that, on this leasehold cottage property, the trustees might not advance a proportion of the value of the site of the land, the price which the land might realize if it was sold cleared of houses altogether. They are authorized, by the terms of their trust, to advance money on leasehold houses or other property provided that a certain number of years—fifty years—remains unexpired; and leasehold cottage property, as well as freehold cottage property, or freehold or leasehold property of any kind, falls within the terms of their trust, and is property, therefore, on which they can lawfully lend. So far, therefore, the trustees, in my opinion, bring themselves within the sub-section.

Then the sub-section goes on to provide that they shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made. Translated into simpler language, that means and means only, it seems to me, that they shall not be chargeable by reason only of their investing on an insufficient security. The plaintiffs here say that they do not seek to charge these trustees with a breach of trust by reason

WARRINGTON J.
1911
SOLOMON, *In re.*
NORE *v.* MEYER.

only of the insufficiency of the security, but they charge them with a breach of trust by reason of certain negligence of which they were guilty in making the investment. But is that negligence a separate and independent breach of trust with which the trustees are charged? In my opinion it is not. The real breach of trust, and the only breach of trust, with which they are charged is the investment on the insufficient security; the alleged negligence is the circumstance which renders the investment on insufficient security a breach of trust. Of itself, the fact that the security is insufficient would not be a breach of trust. On the other hand, if the security was sufficient, the alleged negligence would not of itself constitute a breach of trust. If a man advances 1000*l.* on property which ultimately realizes more than enough to pay that sum, it matters not in the least that, in making the advance, he did not inquire into the solvency of the mortgagor, or into the amount of the outgoings, or into other circumstances affecting the value; there has been no loss, and there has been no breach of trust; the essence of the breach of trust is the investment on an insufficient security, and the circumstances of negligence are only those circumstances which render that investment a breach of trust. However you look at it, the real charge and the only charge which is made against the trustees is the breach of trust in investing on the insufficient security; in other words, the breach of trust by reason of the proportion borne by the amount advanced to the value of the property. Supposing I were to come to the conclusion that the trustees were to be charged with a breach of trust by reason of their negligence, what would be the measure of their liability? It would be the insufficiency of the security. Whichever way you look at it, it is the insufficiency of the security which is that with which the trustees are charged as a breach of trust. It seems to me, therefore, that, notwithstanding that which I think before the Act would certainly have been treated as culpable negligence on the part of the trustees, they come within the first part of the sub-section, and (provided that they satisfy the subsequent part of it) are not to be chargeable with the breach of trust alleged against them.

Now, do they make out that they are within the second part

of the sub-section? The second part is, first, that in making the loan the trustee is acting upon a certain report. That the trustees in this case acted on the report of Messrs. Toplis & Harding is abundantly clear, and I need say no more about that. Then, that report must be a report as to the value of the property; and that of course it was, and it was to be made by a person whom the trustee reasonably believed to be an able practical surveyor. As to that there can be no question. Messrs. Toplis & Harding were surveyors and valuers of long standing and of good reputation. They had been employed by the trustees for years in making such valuations; they had been employed by the defendant Meyer himself in making valuations on his own behalf. It seems to me beyond question that the trustees in this case believed Mr. Harding, who attended to the business, to be an able practical surveyor or valuer. Next, he must be, or be believed to be,—there is a question about that—instructed and employed independently of any owner of the property. Now, what is meant by "instructed and employed independently of any owner of the property"? I think it means this: that the relation existing between employer and employed must exist as between the trustees and the valuer, and between them only—that the valuer must be entitled to look for his remuneration to the person who employs him, and, on the other hand, must be responsible to that person and to that person only for the due performance of his duty as valuer. When you have that, he is instructed and employed by the trustee, and he is instructed and employed by him independently of the owner. I do not think it is incumbent on the trustee to inquire into all the previous business transactions of the valuer and to find out whether he has at any time recently or long before advised or acted for the mortgagor. He must in this matter be instructed and employed independently of the mortgagor, and, if that is made out, then I think the provisions of the sub-section are satisfied. Is that made out in the present case? The plaintiffs say it is not. I think it is. The trustees, through their solicitors, gave the instructions to the surveyor, and, but for the fact that certain particulars appended to those instructions had, as must necessarily be the case, been furnished by the

WARRINGTON J.
1911
SOLOMON, *In re.* NORE *v.* MEYER.

mortgagor, the mortgagor had nothing whatever to do with the instructions given to Messrs. Toplis & Harding. Then, were they employed by, or partly by, the mortgagor? There again the mortgagor, it seems to me, had nothing to do with their employment. He was not responsible to them for their fee. The contract to value was made between the trustees and the valuers. The duty which the valuers owed they owed to the trustees, and to them alone, and it was the trustees and the trustees alone who were responsible to them for their remuneration. I think it is abundantly made out that that was the true relation between the trustees and the valuers, and that therefore the trustees have, in this case, established that they have acted on a report of a valuer instructed and employed independently of the owner of the property.

The next point is that the sub-section further requires the amount of the loan not to exceed two equal third parts of the value of the property as stated in the report. As to that, there is no question; there is no doubt that the amount advanced did not exceed two third parts of the value of the property as stated in the report.

Now, on that, I think it is desirable to add my opinion to that of other judges who have dealt with this question of valuers' reports made to trustees. It has, I think, undoubtedly become the practice of valuers, thinking that they are thereby complying with the requirements of the Act, to advise practically in every case that trustees may safely advance two-thirds of the value, and that practice appears to be based on the fact that, so far as the liabilities of the trustees are concerned, the Act makes no distinction between one kind of property and another; it only requires that they shall not advance more than two third parts of the value of the property. That, I think, is a mistake. It is the duty of the valuer to consider not only the value of the property, but the proportion which, in his opinion, as an expert and practical man, the trustees would, in each particular case, be justified in advancing. But the fact that the valuer has advised a loan of two-thirds of the value does not make the report a bad one. He has reported that the trustees may safely advance that amount, and that is sufficient for them. I think

valuers should bear in mind that it is their duty, in advising trustees, to advise them not only as to what they consider the actual value, but what proportion of that value the trustees may safely advance upon the security quite independently of any supposed rule relating to the two-thirds; only, of course, if the valuers were so satisfied with the security as to advise the advance, say, of three-fourths, the trustees would not be justified in acting on that advice, because the Act confines them to two-thirds. The trustees, therefore, have not advanced more than two-thirds of the value of the property as stated in the report.

The next requirement of the sub-section is "that the loan was made under the advice of the surveyor or valuer expressed in the report." It is said that that condition has not been complied with because the surveyor and valuer in this case did not in so many words say "I advise the trustees to advance so much money." In my opinion, to so hold would be to cast away the substance for the shadow. The surveyors are told, in their instructions, that a certain security is offered to the trustees, and they are asked to survey that property and to report what, in their opinion, is the value of the security offered, and what amount can be advanced by trustees thereon; and in answer to those instructions they tell the trustees what they consider to be the value of the property, and that that property forms a sufficient security for the amount which they are told in the instructions the trustees are asking them to advise upon. What can that mean except that the surveyors are telling the trustees that they may, in their opinion, properly advance that sum—in other words that they are advising the trustees to make that advance? Could it possibly be contended by the surveyors that the trustees, acting on that report and making the advance, if there were circumstances of negligence or misconduct on the part of the surveyors, could not claim that they were misled by the report and induced to make the advance by it? Of course it could not. The surveyor making this report in answer to such instructions as those must be taken to have known that if his report was favourable the trustees would make the advance, and make the advance to the amount for which he advised the property was sufficient security.

WARRINGTON J.
1911
SOLOMON, *In re.*
NORE *v.* MEYER.

I think, therefore, that the trustees in the present case have complied also with the final requirement of the sub-section, and sufficiently made it appear to the Court that the loan was made under the advice of the surveyor or valuer, and that the advice was expressed in the report.

That being the conclusion at which I have arrived, it follows that the trustees in the present case are not chargeable with the breach of trust which is alleged against them, and the result is that I must dismiss this action against all the defendants with costs.

Solicitors: *J. T. Goddard; Farrar, Porter & Co.; Lewis & Yglesias.*

W. I. C.

PARKER J.
1911
July 21, 26.

VON HATZFELDT-WILDENBURG *v.* ALEXANDER.

[1911 V. 326.]

Vendor and Purchaser—Specific Performance—Agreement for Sale—Contract in Correspondence—Stipulation for Formal Contract—Construction.

An alleged contract for the sale of a leasehold house, contained in letters wherein it was stipulated by the purchaser that her acceptance was subject to, amongst others, a condition that her solicitors should "approve the title to and covenants contained in the lease, the title from the freeholder and the form of contract":—

Held, on the construction of the documents, not to be a complete contract susceptible of being enforced by way of specific performance.

North v. *Percival* [1898] 2 Ch. 128, doubted.

IN this action Princess Clara Elizabeth Von Hatzfeldt-Wildenburg asked for specific performance of an agreement alleged to be contained in three letters for the sale to her by the defendant of the leasehold house No. 13, Grosvenor Square, with the stabling. The letters in question passed between Messrs. Walton & Lee, house agents, acting for the plaintiff, and Messrs. Curtis & Henson, house agents, acting for the defendant. There was no question of their authority to bind their respective clients, nor was there any suggestion of any contract outside the correspondence. The first letter was written to Messrs. Walton & Lee

by Messrs. Curtis & Henson on April 18, 1911, and was as follows:—

"Dear Sirs,—We have received a letter from our client Mr. Granville Alexander, as follows—'I authorize you as my agents to accept on my behalf the sum of twenty-five thousand pounds (25,000*l.*) for the lease of No. 13, Grosvenor Square, possession and completion to be on the 11th day of August next. This is absolutely my very lowest price as I have no wish to sell and the property is not really in the market. It is further to be understood that the purchaser is to take the tenant's fixtures and fittings at a valuation as usual.' We should be glad to hear from you with as little delay as possible."

This was answered by Messrs. Walton & Lee on April 25, 1911, as follows:—

"Dear Sirs,—Referring to your letter to us of the 18th inst., in accordance with instructions received from our client, Her Serene Highness the Princess Hatzfeldt, we accept Mr. Granville Alexander's offer of the above property at the price therein named, namely 25,000*l.* This acceptance is subject to the following conditions:—(1.) That the lease is from the freeholder and has between thirty and thirty-one years to run, and that the annual ground rent is 400*l.* (2.) That Her Serene Highness's solicitors approve the title to, and covenants contained in the lease, the title from the freeholder and the form of contract. (3.) That Her Serene Highness approves her surveyors' report on the condition of the structure, the condition of the drains and drainage system, the heating and water supply and system, and the electric light system and arrangement, and the system and condition of the electric lift. (4.) Tenant's fixtures and fittings to be taken at a valuation in the usual way. Her Highness signifies that the 29th September next, owing to certain arrangements she has made, would be more agreeable to her for completion and possession than August 11th if equally suitable to Mr. Alexander. It is of course understood that the panelling, bedroom fitments and similar fitments are included in the price of 25,000*l.* We shall be glad of a confirmation of the bargain and also to hear when Her Highness's surveyors can make their survey and examination."

PARKER J. 1911 VON HATZFELDT-WILDENBURG v. ALEXANDER.

There followed a letter from Messrs. Curtis & Henson to Messrs. Walton & Lee dated April 26, 1911 :—

"Dear Sirs,—We are in receipt of your letter of yesterday's date written on behalf of your client, Her Serene Highness the Princess Hatzfeldt, and we have now seen Mr. Granville Alexander thereon : that gentleman instructs us as his agents to confirm the acceptance of our offer for the sale of the lease of the above, and further that gentleman is agreeable to the date for the completion and possession being on the 29th September next, instead of August 11th, as previously mentioned. It should be noted that the lease is for a term of thirty years from November last, and is held direct from the freeholder, and if you refer to our letter of March 6th last we then mentioned about thirty years. Our client requests that you will kindly inform us of the name of the solicitors who will act on behalf of Princess Hatzfeldt so [*sic*] we may place those gentlemen in communication with Mr. Granville Alexander's solicitors. Further as it is proposed to prepare the house for occupation early next week it is essential that your client's surveyor should immediately proceed with what is desired to be done as after that date the house cannot be seen. We may mention that there is some further painting &c. that was ordered and this will still be carried out notwithstanding that Mr. Granville Alexander has undertaken to sell."

The plaintiff did not approve of her surveyor's report and demanded a contribution of 1000*l.* from Mr. Alexander towards making good deficiencies and wants of repair. The defendant withdrew the offer to sell, and the plaintiff brought this action.

Buckmaster, K.C., and *Douglas M. Hogg*, for the plaintiff. The Court will look at all the documents and, if it finds that two or three of the letters form a complete contract, it will hold that to be the contract, and that it cannot be altered except by agreement : *Hussey* v. *Horne-Payne*. (1) Subsequent letters are only relevant for the purpose of shewing whether there was in fact a complete bargain : *Bristol, Cardiff and Swansea Aerated Bread Co.* v. *Maggs* (2) ; *Bellamy* v. *Debenham*. (3) Here

(1) (1879) 4 App. Cas. 311. (2) (1890) 44 Ch. D. 616.
(3) (1890) 45 Ch. D. 481 ; [1891] 1 Ch. 412.

there was a complete agreement and the defendant is bound by it. A formal condition like the stipulation that the freehold title shall be approved is immaterial and we might have waived it; the question is one of construction of the documents: Fry on Specific Performance, 5th ed. p. 261; *Winn* v. *Bull* (1); *Crossley* v. *Maycock*. (2)

A. Grant, K.C., and *H. Greenwood*, for the defendant. The plaintiff is not entitled to specific performance. The principle of law is well settled. If an agreement is expressly made subject to a condition that a formal contract shall be drawn up, it is not an agreement which can be enforced. If at one stage of the negotiations there appears to be a concluded agreement, it is not binding if the subsequent correspondence shews that other terms were in the contemplation of the parties: *Bristol, Cardiff and Swansea Aerated Bread Co.* v. *Maggs*. (3) The letters in the present case do not form a completed contract; but if they do the plaintiff has herself tried to reopen it. The judgment of North J. in *Bellamy* v. *Debenham* (4) was not accepted by the Court of Appeal (5) and cannot be relied on. The plaintiff could not have waived the condition as to the freehold title: *Lloyd* v. *Nowell*. (6) There is no contract so long as it is subject to the preparation of a formal contract: *Winn* v. *Bull*. (1) There was only a conditional acceptance in the present case; we could not have sued the plaintiff: *Hudson* v. *Buck* (7); *Harvey* v. *The Principal and Ancients of Barnard's Inn* (8); *Watson* v. *McAllum* (9); *Jones* v. *Daniel* (10); *Honeyman* v. *Marryat*. (11)

Buckmaster, K.C., in reply. No new question of principle is involved in this case. The argument that we cannot waive the condition as to the freehold title implies that there is a completed contract. The question whether there was to be a formal contract depends upon the construction of the letters. In this case the agreement was completed, although approval was

(1) (1877) 7 Ch. D. 29.
(2) (1874) L. R. 18 Eq. 180.
(3) 44 Ch. D. 616.
(4) 45 Ch. D. 481.
(5) [1891] 1 Ch. 412, 419—423.
(6) [1895] 2 Ch. 744.
(7) (1877) 7 Ch. D. 683.
(8) (1881) 50 L. J. (Ch.) 750.
(9) (1902) 87 L. T. 547.
(10) [1894] 2 Ch. 332.
(11) (1855) 21 Beav. 14.

PARKER J. stipulated for and a formal contract: *North* v. *Percival* (1); *Rossiter* v. *Miller* (2); *Chipperfield* v. *Carter*. (3)

1911

VON HATZFELDT-WILDENBURG v. ALEXANDER.

A. Grant, K.C., in reply on the authorities. *North* v. *Percival* (1) is doubted in Williams on Vendor and Purchaser, vol. i. p. 17.

July 26. PARKER J. read the letters and said that the first seemed to be a firm offer by the defendant to sell the premises in question for 25,000*l.*, the tenant's fixtures and fittings to be taken at a valuation. It was clear that the second letter was not an acceptance of the defendant's offer to sell, but was an offer on the part of the plaintiff to purchase the hereditaments on different terms. His Lordship continued: In my opinion the third letter is an acceptance of the offer made in the letter of April 25. The question I have to determine is whether this acceptance resulted in a binding contract. The defendant says it did not and contends (1.) that upon the true construction of the letters themselves there is no binding contract, and (2.) that at any rate there is no such contract if on the principle of *Hussey* v. *Horne-Payne* (4) those letters be looked at in the light of the rest of the correspondence between the parties.

The argument on the true construction of the letters themselves depends on the reference contained in the offer of April 25 to the form of contract being approved by the purchaser's solicitors. This no doubt shews that the approval of the purchaser's solicitors of a more formal document containing the terms of the agreement between the parties for the sale and purchase of the premises in question was in the contemplation of Messrs. Walton & Lee, and if a formal document was to be approved, it was no doubt also contemplated that it would be executed. I think I must take it that Messrs. Curtis & Henson in accepting the terms offered by the letter of April 25 accepted them on the same footing.

It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties,

(1) [1898] 2 Ch. 128.
(2) (1878) 3 App. Cas. 1124.
(3) (1895) 72 L. T. 487.
(4) (1878) 8 Ch. D. 670; 4 App. Cas. 311.

it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored. The fact that the reference to the more formal document is in words which according to their natural construction import a condition is generally if not invariably conclusive against the reference being treated as the expression of a mere desire. *North* v. *Percival* (1) appears to be an exception to this rule, but I doubt whether that case was correctly decided: see the earlier decision of Sir George Jessel in *Winn* v. *Bull.* (2) What then is the true construction of the letters said to constitute the contract? The letter of April 25, unlike the letter of April 18, is in form a conditional and not a firm offer. It is expressed to be subject to four conditions. The first condition is in the nature of a condition precedent making the acceptance dependent on the existence of a certain state of facts. That state of facts existed and the condition may therefore be disregarded. The third condition in effect provides that the plaintiff is not to be bound by her offer unless she approves a report to be made by her surveyors on the drains and other matters. It also is a condition either precedent or subsequent. The fourth condition is not really a condition at all, but a term of the bargain. It is the second condition which contains the reference to the formal contract. It provides that the plaintiff's solicitors approve the title to and covenants contained in the lease, the title from the freeholder and the form of contract. There is some authority for saying that where a purchaser stipulates that his solicitor shall approve the title of the property such stipulation may possibly be construed as a recognition that the title will be examined in the usual way and need not be construed as a condition at all. But such a construction is impossible in this case, for the plaintiff's solicitors have to approve also the

(1) [1898] 2 Ch. 128. (2) 7 Ch. D. 29, 32.

PARKER J. 1911 VON HATZFELDT-WILDENBURG v. ALEXANDER.

freehold title, which cannot be called for on an open contract for the sale of a lease. The second condition must therefore, at any rate as to this, be treated as a real condition. It does not in terms compel the vendor to shew the freehold title, but unless he does so to the satisfaction of the purchaser's solicitors he cannot hold the purchaser to her bargain. I do not think it would be in accordance with principle or sound sense to treat the second condition as in part a real condition and in part only the expression of a mere desire on the part of the purchaser. Further, having regard to the fact that the vendor's acceptance is the acceptance of an offer conditional on the execution of a more formal contract, I do not think the condition is one which the purchaser can waive as solely in her own favour. The vendor may well have allowed the condition as to the freehold title to pass in reliance on the fact that his own advisers would insert in the more formal agreement proper provisions in his favour.

My conclusion is that this case is within the principle of *Winn* v. *Bull* (1) and numerous other similar cases, and that the letters do not constitute a binding contract. I need not therefore consider the argument based on *Hussey* v. *Horne-Payne*. (2)

Solicitors: *Guedalla & Jacobson; Cohen & Cohen.*

(1) 7 Ch. D. 29.

(2) 4 App. Cas. 311.

H. C. R.

GRIFFITH *v.* RICHARD CLAY & SONS, LIMITED.

NEVILLE J.

1911

Dec. 18, 19, 20.

[1910 G. 2292.]

Ancient Lights—Obstruction—Measure of Damages—Site Value.

The plaintiff was the owner of two houses fronting a street, and the windows facing the street were ancient lights. He was also the owner of a piece of land immediately at the rear of and adjoining the houses. The defendant erected a large building on the opposite side of the street and obstructed the plaintiff's ancient lights. In an action for damages for obstructing the plaintiff's ancient lights it appeared that the houses were old and dilapidated and would soon have to be demolished, that the neighbourhood was no longer residential, but adapted for factories and workshops, that the site of the houses with the piece of land would together form a building site suitable for a warehouse or factory, and that the value of this building site would be diminished by the obstruction to light in the front:—

Held, that the damages the plaintiff was entitled to recover were not limited to the depreciation in value of the houses, but extended to the diminution in value of the whole of his premises considered as one building site.

In 1865 the plaintiff's predecessor in title purchased two freehold dwelling-houses on the east side of Brunswick Street, Blackfriars, and at the same time a piece of land immediately in the rear of and adjoining the two houses. The two houses were known as Nos. 62 and 63 and had a front elevation of about 34 feet, and their windows facing the street were ancient lights. Both houses were let as private tenements at low weekly rentals. The piece of land at the back, on part of which was a workshop, was known as No. 63A. It was let separately to other tenants, and its only means of access to Brunswick Street was a narrow passage by the side of No. 63. Each of the three premises was separately rated.

The width of Brunswick Street was about 34 feet, and on its opposite or west side and facing theplaintiff's two dwelling-houses were an old saw-mill and timber yard. The saw-mill ran the whole length of the street facing the plaintiff's premises and had a front elevation of about 17 feet 6 inches. In 1910 the defendant company, having acquired the saw-mill and timber yard under a building lease, demolished the saw-mill and on its

NEVILLE J. 1911 GRIFFITH v. RICHARD CLAY & SONS, LIMITED.

site commenced to build large printing works and erected the wall of their new buildings fronting Brunswick Street and opposite to the plaintiff's premises to their intended height of 63 feet before the plaintiff issued his writ in this action.

By his statement of claim the plaintiff alleged that the windows of Nos. 62 and 63 fronting Brunswick Street were ancient lights, and that the defendants' new building was an illegal obstruction of his ancient lights and a serious nuisance, and he claimed a mandatory injunction and damages. No. 63A was not mentioned in the statement of claim. The defendant company by their defence admitted that their new building obstructed the plaintiff's ancient lights, but submitted that under the circumstances it was not a case for a mandatory injunction, but for damages, and they brought 150*l.* into Court and said that sum was reasonable and adequate compensation to satisfy the plaintiff's claim.

On July 7, 1911, on motion for judgment on the admissions in the pleadings the parties agreed, the plaintiff waiving his claim to an injunction, that the issue of damages should be dealt with by the Court. That issue now came on for trial, and a question arose as to the measure of damages.

It appeared that the buildings of Nos. 62 and 63 were very old and dilapidated and would soon have to be pulled down; that the site of Nos. 62 and 63 was, owing to changes in the neighbourhood, no longer suitable for residential purposes; that the site of Nos. 62, 63, with 63A, together formed a building site of about 2050 superficial square feet, of which figure about one half was the area of No. 63A, and was suitable for the erection of a warehouse or factory. The plaintiff's expert witnesses treated Nos. 62, 63, and 63A as one building site suitable for a factory and estimated the depreciation in its value by reason of the obstruction to the ancient lights in front at 250*l.* to 350*l.* The evidence of the defendants' experts went to shew that this estimate was excessive.

Peterson, K.C., and *J. M. Gover*, for the plaintiff. On the evidence the sum paid into Court is insufficient. The site of Nos. 62 and 63 with the piece of land in the rear is one building site, and the selling value of that site as a whole is depreciated

by the defendants' building. It is submitted that the plaintiff is entitled to compensation for that injury.

Jenkins, K.C., and *Vernon*, for the defendants. The question is what is the amount of damages the plaintiff can claim. The 150*l*. is more than enough if the present houses remain or others of a similar character are erected, and the Court will not take into account the effect of the diminution of light in the mind of a purchaser who may want the site for the purpose of erecting a totally different sort of building. In *Colls* v. *Home and Colonial Stores* (1) Lord Macnaghten points out that in the earlier cases actions for obstructing lights were always dealt with on the footing of a nuisance. It is submitted that damages for diminution of site value would be too remote in an action for nuisance. The right to light is restricted to light coming through the old apertures and cannot be extended by erecting a building of an altogether different character.

[NEVILLE J. referred to *Ecclesiastical Commissioners for England* v. *Kino*. (2)]

The dominant tenements in this case are two houses, and, admitting that the plaintiff is entitled to the same quantum of light as he had before, irrespective of the purpose for which he enjoyed it, and that he does not lose his right by any change in the internal structure of his buildings, he is nevertheless only entitled to the same amount of light: *Martin* v. *Goble*. (3) It is true that case was dissented from in *Moore* v. *Hall* (4), but it is upheld by Lords Davey and Lindley in *Colls* v. *Home and Colonial Stores*. (5)

[NEVILLE J. I propose to follow the direction given in *Moore* v. *Hall*. (4)]

In applying that case the Court should have regard only to the site value of the dominant tenements. The plaintiff says "I have a piece of land at the rear of my houses, and putting that with the site of my houses I have a building site which is very useful for a factory or warehouse, and you must pay me for the damage caused to that site by the obstruction to my lights in front," but

(1) [1904] A. C. 179, 186.
(2) (1880) 14 Ch. D. 213.
(3) (1808) 1 Camp. 320, 322.
(4) (1878) 3 Q. B. D. 178, 180.
(5) [1904] A. C. 202, 211.

NEVILLE J. 1911 GRIFFITH v. RICHARD CLAY & SONS, LIMITED.

there is no such case in the books. The dominant tenements are Nos. 62 and 63, and the damage to No. 63A as a building site is too remote. To take it into consideration is to increase the burden of the servient tenement, but the burden on a servient tenement cannot be increased or varied from time to time at the will of the owner of the dominant tenement: *Lanfranchi* v. *Mackenzie*. (1)

Peterson, K.C., in reply.

[NEVILLE J. The whole question is whether I am to take into consideration No. 63A, the piece of land at the back of the two houses.]

The defendants are in default. If the plaintiff had moved in time he could have got an injunction, and then he could have dealt with the whole site as he liked. He is now endeavouring to get in damages what he would have obtained by an injunction. It is admitted that the plaintiff cannot utilize the whole of his property to the best advantage except by treating it as a site for a warehouse or factory, and, that being so, he is entitled to the diminution in value of that site occasioned by the obstruction created by the defendants. In the case of *In re London, Tilbury and Southend Ry. Co. and Trustees of Gower's Walk Schools* (2) ancient and modern lights were obstructed and the plaintiff recovered damages for both. Here the defendants knew they were obstructing our ancient lights and were put upon inquiry, and the damages claimed are the natural and reasonable result of the defendants' acts: Mayne on Damages, 8th ed. p. 55; *Hadley* v. *Baxendale*. (3)

[NEVILLE J. referred to Mayne on Damages, 8th ed. p. 50, as to injuries to property.]

The rule as to damages is the same in actions for breach of contract or for a tort. The test is what is the loss the plaintiff has suffered.

Jenkins, K.C., referred to Mayne on Damages, 8th ed. p. 51, and *Hobbs* v. *London and South Western Ry. Co.* (4) on the question of remoteness.

(1) (1867) L. R. 4 Eq. 421.
(2) (1889) 24 Q. B. D. 326.
(3) (1854) 9 Ex. 341.
(4) (1875) L. R. 10 Q. B. 111, 117.

NEVILLE J. [after coming to the conclusion on the evidence that there had been a serious diminution of light to the plaintiff's premises and the creation of a nuisance which would prima facie have entitled the plaintiff to an injunction against the erection of the defendants' building if he had asked for it at the proper time, continued:] Now I have to consider the question of damages, and with regard to that I feel a difficulty. Am I entitled, in considering the damage occasioned to the plaintiff by the tort committed by the defendants, to limit my consideration solely to the position of the plaintiff as owner of Nos. 62 and 63, and no more, the fact being that he does own the land at the back of Nos. 62 and 63, and that his premises extend to a considerable depth beyond them? In considering the injury done to the value of the plaintiff's premises, his witnesses have taken into consideration the fact that they will in all probability be dealt with as one building site, and that he will suffer loss by reason of the obstruction to light in the front of his premises which having regard to his ownership of the land behind will be very suitable for the purposes to which land in that neighbourhood is now generally and increasingly being applied. I ought to add that one peculiarity in the case is that the houses, which are houses of a poor character and let to weekly tenants, are in a state of dilapidation, and both sides agree it would not pay any one to put them into repair, and that their life must necessarily be a short one—probably cut short by the interference of the local authority.

What I have to decide is, what is the damage occasioned to the plaintiff, and in estimating that am I bound to consider the plaintiff only as the owner of Nos. 62 and 63, or am I entitled to consider him, as he really is, as the owner of the whole site? I think I must consider what the difference would be between the value of the plaintiff's premises as a whole if sold to-morrow to a purchaser and what it would have been had the defendants' building never been carried beyond the grey line shewn on the model produced, and which represents the angle of 45 degrees. So far as I know it is a point which has not arisen before. It seems to me I am entitled to take into consideration the plaintiff's position and to have regard, in considering the

NEVILLE J. 1911 GRIFFITH v. RICHARD CLAY & SONS, LIMITED.

diminution in value of the premises lighted by these windows, to the fact that he is the owner of property which would enable a purchaser from him to acquire a site available for the purpose of erecting buildings of the character which are suitable for the neighbourhood. On this footing I have formed an opinion—of course it must always be a rough guess—as to the difference in value of the site before and after obstruction, and I assess those damages at 200*l.*, with the costs of the action.

Solicitors for plaintiff: *Church, Adams & Prior, for Marshall & Liddle, Croydon.*

Solicitors for defendant company: *Munton, Morris & King.*

H. L. F.

PARKER J. 1911 *Dec.* 19, 20.

METROPOLITAN WATER BOARD *v.* PHILLIPS.

[1911 M. 1059.]

Water—Rate—Provisional Valuation List during Quarter for which Rate payable in advance—Metropolitan Water Board (Charges) Act, 1907 (7 *Edw.* 7, *c. clxxi.*), *ss.* 8, 13—*Valuation (Metropolis) Act*, 1869 (32 & 33 *Vict. c.* 67), *ss.* 43—47.

The defendant was the occupier of premises called "The Brown Bear," in Aldersgate Street, London, E.C. These premises were, during the quarter from October 1 to December 31, 1910, and the preceding and succeeding quarters, supplied with water by the plaintiffs.

In 1908 the valuation list for the parish of the city of London was altered by the making of a supplemental valuation list, in which the rateable value of the "Brown Bear" was shewn at 400*l.* This supplemental list came into force on April 6, 1909. On June 2, 1910, the overseers of the parish sent to the assessment committee, pursuant to s. 47 of the Valuation (Metropolis) Act, 1869, a provisional list, in which the "Brown Bear" was included at the reduced rateable value of 399*l.*, and on June 23, 1910, the committee's clerk served on the defendant, as occupier, a copy of so much of the provisional list as related to the "Brown Bear," with a notice specifying a day on or before which any objection to the list might be made. On October 3, 1910, the committee considered the provisional list and reduced the rateable value to 234*l.*, thereafter returning the list and a copy, after being dated on that day and signed by their clerk, to the overseers in accordance with s. 47 of the Act of 1869.

By s. 8 of the Metropolitan Water Board (Charges) Act, 1907, payment for water so supplied is to be at a rate per annum not exceeding

5 per centum of the "rateable value" of the house or building in respect of which the supply is required. By s. 13 of the Charges Act, "the rateable value . . . . for the purposes of this Act shall be determined by the valuation list in force at the commencement of the quarter for which the water rate accrues." The water rate is payable in advance, and by s. 15 the quarterly days for its payment are April 1, July 1, October 1, and January 1 in each year:—

Held, on the construction of the Charges Act and the Valuation (Metropolis) Act, 1869, that the "valuation list in force" (referred to in s. 13 of the former Act) on October 1, 1910, was the supplemental list made in 1908, unaltered by the provisional list; and that the defendant was liable to pay the rate payable on that date assessed on the rateable value of 400*l.*

The alteration in an existing valuation list, by the provisional list referred to in s. 47 of the Valuation (Metropolis) Act, 1869, is not made and does not come into force until the assessment committee have disposed of the objections to the list, as brought in by the overseers, and the list has been signed as required by that section.

In this action a special case was stated by consent for the opinion of the Court, pursuant to the Rules of the Supreme Court, 1883, Order xxxiv., and was, so far as material, as follows:—

1. This action was commenced on April 27, 1911, by a writ of summons whereby the plaintiffs claimed: (1.) A declaration that upon the true construction of the Metropolitan Water Board (Charges) Act, 1907, the water rate for the defendant's premises, "The Brown Bear," 79, Aldersgate Street, in the city of London, for the quarter from October 1 to December 31, 1910, ought to be calculated upon a rateable value of 400*l.* as being the rateable value thereof according to the valuation list in force at the commencement of the said quarter. (2.) Payment by the defendant to the plaintiffs of 5*l.*, being at the rate of 5 per cent. upon a rateable value of 400*l.* for one quarter's water rate on the said premises from October 1 to December 31, 1910, and of 2*l.* 18*s.* 6*d.*, being at the rate of 5 per cent. on a rateable value of 234*l.* for one quarter's water rate on the said premises from January 1 to March 31, 1911. (3.) Further or other relief.

2. This action is brought to have it determined what is the rateable value on which the water rate of the premises occupied by the defendant and known as "The Brown Bear" is to be calculated for the quarter from October 1 to December 31, 1910.

PARKER J. 1911 METROPOLITAN WATER BOARD v. PHILLIPS.

3. The said premises were during the whole of the said quarter and of the preceding and succeeding quarters supplied with water by the plaintiffs under the provisions of the Metropolitan Water Board (Charges) Act, 1907 (hereinafter called "the Charges Act"), and under s. 8 thereof the payment therefor is to be made at a rate per annum which shall not exceed 5 per cent. of the rateable value of the house or building . . . . in respect of which the supply is required.

[Paragraph 4 stated s. 13, sub-s. 1, of the Charges Act, which is set out in the judgment of Parker J.]

5. By s. 70 of the Waterworks Clauses Act, 1847 (which is incorporated with the Charges Act) it is provided that water rates shall be paid in advance by equal quarterly payments in England . . . . at Christmas Day, Lady Day, Midsummer Day, and Michaelmas Day, and by s. 15 of the Charges Act it is provided as follows: "Notwithstanding anything contained in section 70 of the Waterworks Clauses Act 1847 the quarterly days for payment of water rates to the Board shall be the 1st day of April the 1st day of July the 1st day of October and the 1st day of January in each year."

6. In the year 1908 the valuation list then in force in the parish of the city of London was altered by the making of a supplemental valuation list, in which the rateable value of the said premises was shewn at the sum of 400*l*. The rateable value of the said premises as shewn in any list made previously thereto is not material to this case. Such supplemental valuation list came into force on April 6, 1909, and the plaintiffs contend that it is upon the rateable value shewn therein for the said premises that the water rate for the quarter from October 1 to December 31, 1910, is to be calculated.

7. On or about June 2, 1910, the overseers of the parish of the city of London sent to the assessment committee, pursuant to the Valuation (Metropolis) Act, 1869, s. 47, a provisional list in which the said hereditaments were included at the reduced rateable value of 399*l*., and on June 23, 1910, the clerk of the assessment committee served upon the defendant, as the occupier of the said hereditaments, a copy of so much of the said provisional list as related to the said hereditaments. The said copy of the provisional

list was accompanied by a notice specifying a day on or before which any objection to the said provisional list might be made.

8. Upon October 3, 1910, the assessment committee considered the said provisional list and reduced the rateable value of the said hereditaments to 234*l.*, thereafter returning the said list and a copy thereof, after being dated on that day and signed by their clerk, to the overseers in accordance with the provisions of s. 47 of the said Act of 1869.

[Paragraph 9 stated s. 43 of the Valuation (Metropolis) Act, 1869, which is set out in his Lordship's judgment.]

10. Sect. 47 of the said Act provides for the making of provisional lists in certain circumstances, and for the manner in which such lists are to be made.

[The paragraph stated sub-clauses 3, 7, 8 and 10 of s. 47, which, with other sub-clauses of the same section, are set out in his Lordship's judgment.]

11. On or about September 1, 1910, the defendant paid to the plaintiffs, in respect of the water rates on the said premises for the quarter from July 1 to September 30, 1910, the sum of 5*l.*, being at the rate of 5 per cent. upon a rateable value of 400*l.* If the Court holds that the said provisional list formed part of the valuation list in force at the commencement of the quarter from October 1 to December 31, 1910, within the meaning of s. 13 of the Charges Act, and that the water rate for that quarter is to be calculated upon a rateable value of 234*l.* instead of 400*l.*, the plaintiffs admit that the principle of such decision applies also to the previous quarter from July 1 to September 30, 1910, and that the defendant is entitled to credit for the sum of 2*l.* 1*s.* 6*d.*, being the difference in the amount of the water rate payable for the quarter if calculated on a rateable value of 234*l.* instead of 400*l.*

12. It is common ground between the parties that the water rate demandable from the defendant in respect of the quarter from January 1 to March 31, 1911, is to be calculated at the rate of 5 per centum per annum upon a rateable value of 234*l.*, and amounts to 2*l.* 18*s.* 6*d.*

13. The amount alleged by the plaintiffs to be due to them by the defendant is shewn in paragraph 2 of the indorsement

PARKER J. 1911 METROPOLITAN WATER BOARD v. PHILLIPS.

of the writ of summons herein, set out in paragraph 1 hereof. The following statement shews the amount which the defendant alleges that he is liable to pay to the plaintiffs :—

Paid for water rate for the quarter from July 1 to September 30, 1910, at 5 per cent. per annum on a rateable value of 400*l.*	£5	0	0
Less amount due for that quarter at 5 per cent. per annum on a rateable value of 234*l.* ...	2	18	6
Amount overpaid in respect of that quarter ...	£2	1	6
Water rate for the quarter from October 1 to December 31, 1910, at 5 per cent. per annum on a rateable value of 234*l.*	£2	18	6
Water rate for the quarter from January 1 to March 31, 1911, calculated on the same basis	2	18	6
	5	17	0
Less amount overpaid as above	2	1	6
Whole amount admitted by defendant to be due	£3	15	6

The said amount of 3*l.* 15*s.* 6*d.* was tendered to the plaintiffs' collector by the defendant on December 29, 1910, and was again tendered to the plaintiffs' solicitor by the defendant's solicitor on his behalf on March 29, 1911. Such tender was on both occasions refused.

The question for the opinion of the Court is, whether upon the true construction of the Metropolitan Water Board (Charges) Act, 1907, and under the circumstances above set out, the water rate in respect of the said premises of the defendant for the quarter from October 1 to December 31, 1910, ought to be calculated upon the rateable value of the said premises appearing in the quinquennial valuation list, 1905, as altered by the supplemental valuation list made in the year 1908, but not as altered by the said provisional list, namely, 400*l.*, or whether the said rate for the said quarter ought to be calculated upon the rateable value appearing in the said quinquennial valuation

list as altered, inter alia, by the said provisional list, namely, 234*l.*

If the Court shall be of opinion that the said water rate ought to be calculated on the rateable value of 400*l.*, then judgment is to be entered for the plaintiffs for the sum of 7*l.* 18*s.* 6*d.* with costs.

If the Court shall be of opinion that the said water rate ought to be calculated on the rateable value of 234*l.*, then judgment is to be entered for the plaintiffs for the sum of 3*l.* 15*s.* 6*d.*, the plaintiffs to pay the defendant's costs.

Romer, K.C., and *J. Goodland* (*A. B. Shaw* with them), for the plaintiff Board. The rate is to be calculated on the rateable value of 400*l.* The preamble to the Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), recites that the Metropolis Water Act, 1902, provides that the Board is within a certain period to bring in a Bill "providing for uniform scales of charges applicable throughout their limits of supply," and that "it is expedient to provide for such uniform scales of charges." Then s. 8 provides that "Subject to the provisions of this Act, the Board shall at the request of the owner or occupier of any house or building . . . . within the limits of supply . . . . furnish to such owner or occupier . . . . a sufficient supply of water for domestic purposes at a rate per annum which shall not exceed 5 per centum of the rateable value of the house or building . . . . in respect of which the supply is required, and such rate shall, subject to the provisions of this Act, be charged uniformly under like circumstances to all consumers entitled to such supply." The rate is therefore to be a percentage on the "rateable value." Sect. 13 points out the mode of determining the rateable value, and provides by sub-s. 1 that "the rateable value . . . . for the purposes of this Act shall be determined by the valuation list in force at the commencement of the quarter for which the water rate accrues or (if there is no such list in force) by the last rate made for the relief of the poor or other rate in which such last-mentioned rate is included." The same sub-section contains a proviso that if no rateable value is assigned in any such valuation list as aforesaid to any house or building, and such house or

PARKER J. 1911 METROPOLITAN WATER BOARD v. PHILLIPS.

building is not rated to any rate for the relief of the poor, or to any such other rate, "the annual value of such house or building, ... determined in manner provided by section 68 of the Waterworks Clauses Act, 1847, shall for the purposes of this Act be deemed to be the rateable value of such house or building." Then the remaining part of the section, sub-s. 2, says that "Subject to the foregoing provisions of this section, the Water Rate Definition Act, 1885, shall extend and apply throughout the limits of supply, and in construing the proviso to section 1 of that Act, the words 'rateable value' shall be substituted for the words 'annual value.'" Then s. 15 provides that "notwithstanding anything contained in section 70 of the Waterworks Clauses Act, 1847, the quarterly days for payment of water rates to the Board shall be" April 1, July 1, October 1, and January 1 "in each year." Sect. 68 of the Act of 1847, referred to in s. 13 of the Charges Act, says that the water rate is to be paid by the water user, and is to be payable according to the annual—now rateable—value of the house supplied. By s. 70 of the Act of 1847 the rates were to "be paid in advance by equal quarterly payments" on the usual quarter days, and the days of payment are now altered as provided by s. 15 of the Charges Act.

Sect. 1 of the Water Rate Definition Act, 1885, provided that the words "the annual value of the tenement supplied with water" in s. 68 of the Waterworks Clauses Act, 1847, should, within the unions and parishes to which the Valuation (Metropolis) Act, 1869, extended, "mean the rateable value as settled from time to time by the local authority as duly constituted"; with a proviso applying where water rate was chargeable on the annual value of a part only of any hereditaments entered in the valuation list. Omitting the proviso, the effect was that the Act of 1869 determined the date when rateable value was to be determined, and with reference to that the water rates were levied.

We say that on October 1, 1910, when the rate in question was payable in advance, there was a "valuation list in force" within the meaning of s. 13, sub-s. 1, of the Act of 1907, which fixed the rateable value of the "Brown Bear" at 400*l.*, and that it is on that amount that the rate is to be assessed. The defendant

says that having regard to the Valuation (Metropolis) Act, 1869, and to the fact that on October 1, 1910, proceedings were being taken to obtain a provisional list, which list as finally settled reduced the rateable value of the "Brown Bear" to 234*l.*, that sum is the rateable value on which water rate is to be assessed. It is necessary, therefore, to scrutinize the material sections of the Valuation (Metropolis) Act, 1869. Sect. 42 requires the overseers to make and deposit a valuation list before June 1, 1870, and provides as to the transmission of the list to the assessment committee, notice of objections by persons affected, revision of the list by the assessment committee after hearing objections, and the final approval of the list by the committee, which is then to send the list to the overseers and to others. The section also provides for appeals to justices.

By s. 43 the valuation list as approved by the assessment committee and as altered by the justices or a superior Court is to come into force on April 6 in the year following and "shall last for five years, subject to any alteration that may be made by any supplemental or provisional list as hereinafter mentioned"; so that subject to any such valuation the quinquennial list fixes the amount of the rateable value.

By s. 44, notwithstanding any appeal, the rate has to be paid; if too much has been paid, the balance has to be refunded; if too little, the increase has to be paid by the person rated. Sect. 45 provides that the list is to be conclusive. Then, by s. 46, every valuation list is to be revised, and the revision in every period of five years (the first beginning with April 6, 1871) is to be conducted in the manner pointed out; that is to say, in each of the first four years of the quinquennial period, a supplemental list is, if necessary, to be made out shewing any alterations—such as rateable value—which have taken place during the preceding twelve months, and the same regulations and proceedings are to be observed and had as in the case of the first valuation list, the supplemental list coming into force at the beginning of the year succeeding that in which it is made. In each of the last four years of the period the valuation list "in force" on the day before the commencement of each such year, together with and as altered by the supplemental list which comes "into force" at

PARKER J. 1911 METROPOLITAN WATER BOARD v. PHILLIPS.

the commencement of such year, is to "be the valuation list which is in force during that year."

In the present case, when the rate became payable, namely, October 1, 1910, there was a supplemental list which had come into force on April 6, 1909, and which shewed the rateable value of the "Brown Bear" to be 400*l.*, and we submit that on that amount the defendant is liable to pay the water rate.

But before October 1, 1910, namely, on June 2, 1910, the machinery was started to alter rateable values stated in the supplementary list then "in force" by means of such a "provisional list" as is provided for by s. 47 of the Act of 1869. (1)

Sect. 47 says that if in the course of any year the value of any hereditaments "is from any cause increased or reduced" the ensuing provisions shall have effect. By provision (1.) the overseers of the parish in which the rateable hereditament is situate may and in certain cases must "send to the assessment committee a provisional list containing the gross and rateable value, as so increased or reduced, of such hereditament." By provision (3.) on the receipt of the list the committee's clerk is to serve on the occupier of any hereditament to which the list relates "a copy of so much thereof as relates to that hereditament" and the copy is to be accompanied by a notice specifying when and how any objection to the provisional list may be made. Provisions (4.) and (5.) state how the occupier's objection is to be made, and make provision as to summoning a meeting of the assessment committee and giving notice to the occupier and others. Under provision (6.) the committee hears and determines on the objection and makes its order thereon, and under provision (7.) the committee is to cause a copy to be made of the provisional list, with any alterations in it, and to "return the list and the copy thereof, after being dated and signed by their clerk, to the overseers." Then comes provision (8.), on which the defendant relies; it says that "a provisional list, signed as aforesaid, shall have operation from the date of the service by the clerk of the assessment committee of a copy of the list and notice on the occupier, and shall continue in force until the first

(1) The material portions of this section are stated in the judgment of Parker J., pp. 312—315, post.

list (supplemental or other) which is subsequently made comes into force."

Sect. 47 contains no provision for service of the completed provisional list except provision (8.); but the defendant will say that the notice referred to in that provision is the notice required to be served under provision (3.). That notice was served on the defendant on June 23, 1910, but the reduction in the rateable value was not made until October 3, 1910, two days after the rate was payable in advance. The Charges Act fixes that as the absolute date on which the rate is payable and says how the amount is to be ascertained, namely, by reference to the existing valuation list completed and in force—in this case the supplemental and not the provisional list. The latter cannot be in force before it is signed by the assessment committee. Provision (9.) refers to the duties of the overseers when the provisional list has come into operation, and provision (10.) makes the list "during the time that it is in force" "part of the valuation list for the time being in force." There is no appeal from a provisional list, but provision (10.) provides for a subsequent adjustment when too much or too little has been charged.

If our contention is right the mode of assessment is not unfair on the defendant, for when his rateable value is increased he gains by not having to pay the heavier water charge from the earlier period. The charge is not really a rate at all: *Badcock* v. *Hunt* (1); and it is questionable whether s. 47, sub-s. 10, applies, as it appears to deal only with rates and taxes properly so called.

[PARKER J. The strength of your argument is that the water charge is payable in regard to an existing figure, but that vanishes if the scheme of your Act is the same as that applicable to ordinary rates.]

We say that the provisional list only came into force on April 6, 1911. [They also referred to the Metropolitan Water Board (Various Powers) Act, 1907 (7 Edw. 7, c. clxxiv.), and Ryde on Rating, 2nd ed. pp. 654, 657.]

Ryde, K.C., and *Konstam*, for the defendant. The question is what is the meaning of the Metropolitan Water Board (Charges) Act, 1907, having regard to the Valuation (Metropolis)

(1) (1888) 22 Q. B. D. 145.

PARKER J. 1911 METROPOLITAN WATER BOARD v. PHILLIPS.

Act, 1869. Sect. 13 of the Charges Act adopts the scheme of the Water Rate Definition Act, 1885, which was passed to explain s. 68 of the Waterworks Clauses Act, 1847, and the Charges Act simply substitutes "rateable value" for "annual value." Where there is a bona fide dispute as to what is "rateable value," the company cannot sue for the rate until the dispute has been settled: *New River Co.* v. *Mather.* (1)

The Valuation (Metropolis) Act, 1869, was framed on the assumption that appeals to sessions would be disposed of by March 31, and that the new lists would come into force on April 6. The supplemental list, like the quinquennial list, comes into force on April 6. The reduction in the rateable value of the "Brown Bear" was in consequence of the Finance (1909-10) Act, 1910. It is manifestly unfair that the occupier should for a long period be paying his water rate on a rateable value which has been declared to be too high, and it is small consolation to him that other occupiers are paying less than they ought to pay. Down to 1869 the latest valuation list was taken as the basis for assessment, and outside the metropolitan area this course is still followed. Sect. 43 of the Act of 1869 points out what is the list in force. Sect. 13, sub-s. 2, of the Charges Act compels the plaintiffs to rely on s. 47 of the Act of 1869. The notice referred to in provision (8.) of that section is the notice mentioned in provision (3.). In *Parrish* v. *Hackney Borough Council* (2) the defendants' counsel gave up the point that this was not the true construction to be put on the section. Some effect must be given to the words "shall have operation" in provision (8.), and those words must mean "shall come into force," having regard to the later words of that provision. The combined effect of the enactments is that the provisional list comes into force retrospectively, and in this case was in force on October 1, 1910. [They also referred to the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), s. 28; the Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), s. 1; and *Imperial and Grand Hotels Co.* v. *Christchurch Guardians.* (3)]

Romer, K.C., in reply.

(1) (1875) L. R. 10 C. P. 442.
(2) (1911) 28 Times L. R. 110.
(3) [1905] 1 K. B. 89; [1905] 2 K. B. 239.

PARKER J. In this case I am inclined to agree with the argument of the defendant's counsel that if I could give the Act in question the construction which they desire, it would probably be fairer as between the various persons who are chargeable with the water rate levied by the plaintiffs, the Metropolitan Water Board; but since yesterday I have had an opportunity of reading the Act more carefully than I had while the case was being argued, and I have come to the conclusion, for reasons which I will explain, that I cannot give the Act in question the construction which they desire me to put upon it.

We start with the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), and we find that by s. 68 of that Act water rates, except in certain cases referred to, are to be "paid by and recoverable from the person requiring, receiving, or using the supply of water, and shall be payable according to the annual value of the tenement supplied with water, and if any dispute arise as to such value the same shall be determined by two justices." Then s. 70 provides that the rates payable in respect of water shall be paid in advance by equal quarterly payments, speaking roughly, with regard to this country, on the usual quarter days. Now it is clear from those two sections that the annual value in respect of which the water rate is to be levied must be the annual value on the first day of the quarter for which it is payable—otherwise it would be impossible to fix the sum payable on that day. Any variation, therefore, in the annual value of a tenement in respect of which the rate is levied, taking place during the quarter, would be immaterial for the purposes of the rate payable in that quarter. It is true that, though the rate is payable on the first day of the quarter, yet it may at times be impossible for it to be recovered on that day, and for this reason, that it is levied in respect of an annual value which, in the case of any dispute, is to be determined by two justices, and consequently, if there is a bona fide dispute, the rate cannot be actually recovered until that dispute is settled in the manner provided by the Act. It is true also that, unless the rate is paid in advance, there is another section (s. 74) under which the water company would have power to cut off the supply, but I think it is well settled that, if there is a bona fide dispute and proceedings are pending, or intended to be

PARKER J. 1911 METROPOLITAN WATER BOARD v. PHILLIPS.

immediately taken to settle that dispute in the manner provided by the Act, this Court will grant an injunction against cutting off the supply pending the determination of the question at issue.

That remained the state of the law up to the passing of the Water Rate Definition Act, 1885 (48 & 49 Vict. c. 34)—the rate chargeable by one company or another company might vary because of the special provisions in their special Acts, but the annual value in every case was that by which the amount of the rate was to be calculated. But by the Water Rate Definition Act, 1885, an alteration was made with regard to such part of the area of each water company as lay within the metropolitan district, and, in substitution for the provisions of the Waterworks Clauses Act, 1847, with respect to the water rate within that area, the Act of 1885 provides that "The words 'the annual value of the tenement supplied with water' in the 68th section of the Waterworks Clauses Act, 1847, shall, within the unions and parishes to which the Valuation of Property (Metropolis) Act, 1869, extends, mean the rateable value as settled from time to time by the local authority as duly constituted: provided that where the water rate is chargeable on the annual value of a part only of any hereditament entered in the valuation list, such annual value shall be a fairly apportioned part of the rateable value of the whole tenement, ascertained as aforesaid, the apportionment in case of dispute to be determined in manner provided by the said section"—that is to say, to be determined by two justices. Now the effect of that is, that in the ordinary case—leaving out the exception to which the proviso is intended to relate—the annual value of the property on the date at which the rate becomes payable, that is to say, on the first day of each quarter, is its rateable value as determined by the local authority under the Valuation (Metropolis) Act, 1869, and not its annual value as determined by two justices.

By the Metropolis Water Act, 1902 (2 Edw. 7, c. 41), the plaintiff Water Board was formed for the purpose of taking over and working the undertakings of the various companies mentioned in that Act, and shortly after the passing of that Act the plaintiff Board did acquire the undertakings of the companies mentioned,

and commenced to carry on those undertakings,—for that purpose, of course, being treated as the successor of and with all the powers of the companies whose undertakings it acquired. But it appears to have been a condition of the passing of that Act (s. 15, sub-s. 6) that the Water Board should, within three years after the appointed day, introduce into Parliament and procure the passing of an Act for the purpose of making the various rates payable in the various areas under the jurisdiction of the old companies uniform throughout: and in pursuance of that obligation the Board introduced and procured the passing of the Metropolitan Water Board (Charges) Act, 1907, upon the true construction of which, to a large extent, the question I have to decide depends. That Act provides, in s. 8, for a uniform rate per annum not exceeding "five per centum of the rateable value of the house or building or part of a house or building in respect of which the supply is required" and in respect of which the water is supplied.

Then comes the important clause of the Act of 1907, s. 13, the first sub-section of which provides that "The rateable value of any house or building or part of a house or building for the purposes of this Act shall be determined by the valuation list in force at the commencement of the quarter for which the water rate accrues or (if there is no such list in force) by the last rate made for the relief of the poor or other rate in which such last-mentioned rate is included." Then comes the proviso that if there is no rateable value assigned in the valuation list to any house or tenement, or if there is no such rate by reference to which the rateable value can be ascertained, then the water rate is to be levied by reference to the annual value of the property, determined in manner provided by s. 68 of the Waterworks Clauses Act, 1847. Then sub-s. 2 of s. 13 says that "Subject to the foregoing provisions of this section the Water Rate Definition Act, 1885, shall extend and apply throughout the limits of supply and in construing the proviso to section 1 of that Act the words 'rateable value' shall be substituted for the words 'annual value.'" Though, therefore, the Water Rate Definition Act, 1885, applies, its application must be considered as subject to the provision that, notwithstanding that under the Act of 1885 the rateable value is that determined by the local

PARKER J. 1911 METROPOLITAN WATER BOARD v. PHILLIPS.

authority, yet that rateable value is to be taken as the rateable value appearing—at any rate if it does appear—in the valuation list in force at the commencement of the quarter for which the rate becomes payable. There is, therefore, to that extent, an alteration in the law; no longer is the Water Rate Definition Act, 1885, to apply simpliciter, but it is to be taken as applicable, subject to the provision I have mentioned, which makes the valuation list in force at the commencement of the quarter for which the rate is payable conclusive as to the value with reference to which the water rate is to be assessed.

In order to ascertain the meaning of that it is necessary to look at the Valuation (Metropolis) Act, 1869. I do not think that, for the purposes of this case, it is necessary to look, at any rate closely, at the various Acts which relate to valuation lists for areas outside the metropolitan area, for this question has arisen as to property within the metropolitan area, and therefore it is the Act relating to valuation lists within the metropolis which is the important Act. The Valuation (Metropolis) Act, 1869, provides—I shall refer to the provisions only in general terms until I come to s. 43—in effect as follows: A valuation list is to be made in the year next succeeding the passing of the Act, that is to say, in the year 1870. That valuation list is to be prepared by the overseers. Objections are taken before the assessment committee, and the assessment committee, having heard and determined the objections, is to revise the list. Provision is made for appeals, and, subject to any alteration made in the list, either by the assessment committee or on appeal, the list is to come into operation on April 6 in the next year, that is the year 1871. Then, elaborate machinery having been laid down for the making of that list, s. 43 provides as follows: "The valuation list as approved by the assessment committee, and, if altered on any appeal under this Act to any sessions or a superior Court, as so altered, shall come into force at the beginning of the year (commencing on the sixth of April) succeeding that in which it is made, and shall last for five years, subject to any alterations that may be made by any supplemental or provisional list as hereinafter mentioned." That is the provision which determines what "the valuation

list in force" means, and it is material to look at the next two sections to see what is the object and intention of the provisions which relate to the list being in force. If we look at s. 44, it appears that the list is to come into force notwithstanding that on April 6 there may be pending appeals, for it provides that "notwithstanding any appeal under this Act which may be pending at the commencement of the year, the valuation list shall come into force unaltered, and every assessment, contribution, rate, and tax in respect of which the valuation list is conclusive shall be made, required, levied, and paid in accordance with such valuation list." The section, however, provides that if on appeal, when the appeal comes to be heard, any alteration is made, the list shall be altered, and there shall be an adjustment between the authority levying the rate and the person on whom the rate is levied, so as to give retrospective effect to the alteration.

Then s. 45, which appears to me to be of considerable importance, provides that "the valuation list for the time being in force shall be deemed to have been duly made in accordance with this Act and the Acts incorporated herewith, and shall for all or any of the purposes in this section mentioned be conclusive evidence of the gross value and of the rateable value of the several hereditaments included therein, and of the fact that all hereditaments required to be inserted therein have been so inserted." Then there are three headings under which are defined the purposes for which the list is conclusive, the first relating to rates and taxes leviable with reference to rateable value, the second to taxes on houses under the House Tax Act or the Income Tax Acts, and the third, which appears to me to be important for this purpose, which provides that the valuation for the time being in force is to be conclusive, amongst other things, "for the purpose of determining, so far as it is applicable, the value of any hereditament included therein for the purposes of the Acts relating to the sale of exciseable liquors, to the qualification of a juror, to the qualification of a vestryman, and an auditor of accounts under the Metropolis Management Act, 1855, and to the qualification of a guardian and of a manager under the Poor Law Amendment Act, 1834, or the Metropolitan

PARKER J. 1911

METROPOLITAN WATER BOARD v. PHILLIPS.

Poor Act, 1867, at any time at which such value is required to be ascertained."

Then, pursuing the scheme of the Act, we find that s. 46 provides with regard to the valuation list in the following way: During every year of the period for which the original valuation list or any subsequent quinquennial valuation list is in force, except the last year of the quinquennial period, a supplemental list is to be prepared in practically the same way as is provided in the Act with regard to the original list, and, subject to objections heard before the assessment committee and to appeals to quarter sessions and otherwise, the supplemental list is to come into force on April 6 in the next year, and it is to be taken as being a supplement to, and altering so far as it differs from, the original valuation—so that in effect it operates as an annual revision of the list. Then, lastly, in the fifth year of the quinquennial period, an altogether new valuation list is to be made, which is generally referred to as the quinquennial valuation list, and is to be substituted for the old valuation list—coming into force again on April 6 in the year after that in which it has, under the statute, to be prepared. So that the Act provides in effect for a quinquennial valuation, the valuation list being revised by means of the supplemental list in each year, the supplemental list in the last year only coming into force at the commencement of the next financial year.

Now it appears obvious from this that changes in the annual value during the course of any year are immaterial for the purpose of rating, and, but for the clause in the Act of 1869 to which I am about to refer, they would still be immaterial. But it appears to have been felt that a year was too long for the purpose of making a valuation list final between the rating authority and the person responsible for the payment of the rates—for a house, for instance, might be destroyed in the course of the year, and, but for the section which I am about to read, the annual value would not be changed by the destruction of that house until the commencement of the next ensuing financial year. Therefore as it seems to me s. 47 was inserted in order to provide against that kind of injustice, and it provides in effect that a third kind of valuation list shall be made. It provides that "if in the course of any

year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value, the following provisions shall have effect: (1.) The overseers of the parish in which such hereditament is situate may, and on the written requisition of the assessment committee or of any ratepayer of the union or of the surveyor of taxes for the district shall, send to the assessment committee a provisional list containing the gross and rateable value, as so increased or reduced, of such hereditament." That is an obligation on the authorities which in a proper case can be enforced by mandamus. The section also provides as follows: "(3.) On the receipt of the list the clerk of the assessment committee shall serve on the surveyor of taxes for the district a copy of the list, and shall serve on the occupier of any hereditament to which the list relates a copy of so much thereof as relates to that hereditament. Every copy"—so served—"shall be accompanied by a notice specifying a day, being not less than fourteen days after the date of the service of the notice on or before which any objection to the provisional list may be made, and stating the mode in which an objection is to be made. Such copy and notice shall be served in the same way as notices by an assessment committee are served." Then the section provides as follows: "(6.) The committee shall hear and determine on the objection in the same manner as if it were an objection to a valuation list, and may make such order as they think just; (7.) If no objection is made, then on the expiration of the time for making objections, or if an objection is made then as soon as the assessment committee have determined on the objection, the assessment committee shall cause a copy to be made of the provisional list, with any alteration made in it by the committee, and shall return the list and the copy thereof, after being dated and signed by their clerk, to the overseers." Then comes an important provision, as to the meaning of which there has been some doubt: "(8.) A provisional list, signed as aforesaid, shall have operation from the date of the service by the clerk of the assessment committee of a copy of the list and notice on the occupier, and shall continue in force until the first list (supplemental or other)

PARKER J. 1911 METROPOLITAN WATER BOARD v. PHILLIPS.

which is subsequently made comes into force"—that is to say, it continues, at any rate, until April 6 next ensuing, because that is the first date upon which the valuation list subsequently made can come into force. Now, reading that provision literally, it would look as if the copy of the list which is referred to were a copy of "the provisional list, signed as aforesaid"; but if that be the true construction, there is no provision of the Act compelling any such service, nor is it clear what the notice on the occupier is to be a notice of. It has been assumed in various cases that the meaning of the section is that when the list is "signed as aforesaid" it is to have a retrospective effect and is to come into operation as to any particular tenement as from the date on which the clerk of the assessment committee, under sub-clause 3, served the copy and notice therein mentioned. The next provision, which appears to me on any construction of the statute to be badly drawn, provides in the first place as follows: "(9.) Upon a provisional list coming into operation the overseers shall make such entries in the rate-book for the then current poor rate as will bring the same into conformity with such list, and shall also enter therein the date at which such list is to come into operation." If, as on the whole I think, the true construction of sub-clause 8 is that it provides for the retrospective effect of a provisional list when signed as in the Act provided, the effect of the part of sub-clause 9 which I have read must be this—that as soon as the overseers receive the provisional list they are to make such entries as may be necessary to bring the valuation list already existing into conformity with the provisional list, and they must also enter in the existing provisional list the date as from which the provisional list is to have effect. It is observable again that the provisional list may, as to one tenement, have a retrospective effect to a date which is different from a date to which it has retrospective effect with regard to another tenement, for the notices served under sub-clause 3 may not be served on the owners of different hereditaments on precisely the same date. Sub-clause 9 goes on to provide in what respects, when what I have referred to has been done, the provisional list is to have that retrospective force, for it says that the overseers are to "charge the occupier of such hereditament

with a proper proportion of such current poor rate, regard being had to the time which has elapsed between the making of such rate and the said date"—that is, the date as from which the provisional list is to have operation—"and to the rateable value stated in such provisional list, and such occupier shall be considered as actually rated for such sum from the said date, and be liable to pay the same, and the same may be enforced accordingly."

Sub-clause 10 of s. 47 contains another provision which may be material and which is as follows: "A provisional list during the time that it is in force"—and of course in criticizing the section one notices at once the difference between sub-clauses 8, 9, and 10 in that respect, for in a sense, if it is to have a retrospective operation, it is in force retrospectively, yet there is an alteration in the form of the words which is remarkable and gives rise to various difficulties—"shall be deemed to form part of the valuation list for the time being in force, and shall (so far as is necessary) be substituted for so much of that valuation list as relates to the same hereditament, and every rate and tax in respect of which the valuation list is conclusive, which are respectively made or charged after the provisional list comes into force, and the proportion of the current rate charged as before provided in this section, shall be levied accordingly; but if when the next revision of the valuation list takes place the list as approved and altered on appeal contains a smaller value for the hereditament comprised in a provisional list than the value stated in such provisional list, the amount of rate or tax which has been overpaid in consequence of the larger value having been stated shall be repaid or allowed." It is evident, I think, that the latter part of sub-clause 10 is due to this, that there is no provision in the Act for an appeal from the assessment committee in respect of a provisional list, and in the normal course any alterations made in the provisional list would be incorporated in the next list to come into force on the next April 6, and there would be an appeal as to the valuation contained in that supplemental list; and I think the last part of the sub-clause is to prevent any injustice occurring to the individual by reason of his being deprived during the current

PARKER J. 1911 METROPOLITAN WATER BOARD v. PHILLIPS.

year of any appeal against an assessment or valuation contained in the provisional list.

Now the question I have to decide really reduces itself to this, whether, on the true construction of the sub-clauses of s. 47 of the Act of 1869 which I have read, the provisional list comes into force at the date at which it is signed and approved by the assessment committee, or whether it comes into force, within the meaning of s. 13 of the Metropolitan Water Board (Charges) Act, 1907, when the notice under s. 47, sub-clause 3, of the Act of 1869 and the copy of the list prepared by the overseers are served on the occupier. I think a distinction exists, both logically and practically, between these two positions. A list may come into force at one date, and when it comes into force may have a retrospective effect, but it does not follow that, because it has that retrospective effect, it can, logically speaking, be said to have been in force at the earlier date. The question therefore is, whether the list in force referred to in s. 13 of the Charges Act, 1907, is the list actually in force or is a list which, though not actually in force, is subsequently made and given the retrospective effect. In considering that question it appears to me that it is important to remember the provisions contained in s. 45 of the Act of 1869 as to the purposes for which the valuation list in force is to be conclusive. It is conclusive, amongst other things, with regard to the qualification of a juror, the qualification of a vestryman, and so on. Now, of course, the qualification of a juror or a vestryman, and so on, would have to be ascertained at a particular time, and for that ascertainment it is necessary that that with reference to which the fact is to be ascertained should be certain, and the valuation list in force for that purpose would no doubt be the valuation list which was actually in force, notwithstanding that subsequently a new list came into operation which had a retrospective effect—otherwise the effect would be that a juryman or vestryman, or some other person, might find himself suddenly disqualified notwithstanding that the list in force at the date of his appointment contained a valuation which was in all respects sufficient for his qualification. I cannot think that the meaning of s. 47 of the Act of 1869 is that the provisional list is to be in

force as from a prior date so as to disqualify persons who were qualified under s. 45 by reason of the value then assigned to the hereditaments in the valuation list.

It appears to me, therefore, that I must draw a distinction between a valuation list in force and a valuation list which is to have, when it comes into force, a retrospective operation; and, giving the best attention that I can to the construction of this somewhat loosely drawn and difficult section, it appears to me that the true meaning of it is that the valuation list remains in force till altered by a supplemental list or provisional list, and that the alteration in the valuation list by a provisional list is not made until the assessment committee have disposed of the objections to the list as brought in by the overseers and have signed it as provided by s. 47 of the Act of 1869. The alterations seem to me to take place from that date. As from that date it is in force because of the provisions of the section which, as from that date at any rate, provide for the original list being altered so as to bring it into conformity with the differences contained in the provisional list. It is true that when it comes into force it has, if I am right in the construction of sub-clause 8, a retrospective operation, but the fact that it has that retrospective operation does not, in my opinion, make it a provisional list which, for the purposes of the Act, can be said to have been in force prior to that date, although for certain purposes, again provided for in the Act, it has a retrospective effect.

If I go back to s. 13 of the Charges Act and consider what alteration it is intended to make in the existing law, it appears to me that I find this: But for sub-s. 1 the rateable value, as on the commencement of any quarter, would be that which is determined to be the rateable value at that date by the local authorities, and it might be said then that the provisional list was a determination by the local authorities that, as on a former date, the rateable value was of a certain amount. That is altered. It is no longer what the local authorities determine to have been the rateable value as at the commencement of any quarter, but it is that which appears to be the value in the list in force at the commencement of that quarter, and the list in

PARKER J. force at the commencement of the quarter is to be ascertained by reference to certain other Acts.

1911

METROPOLITAN WATER BOARD v. PHILLIPS.

Having come to the conclusion that, for the purposes of the Valuation (Metropolis) Act, 1869, the list in force is the list which governs the rating arrangements of the district, irrespective of the provisional list, until that list is signed by the clerk of the assessment committee, and returned as altered to the overseers, when the overseers are required to alter the existing list, it appears to me that I am bound also to come to the conclusion that the list which is referred to in s. 13 of the Charges Act is the existing list, unaltered by any provisional list, unless and until that provisional list has been signed in the manner required by the Act of 1869 after hearing the objections of any parties entitled to object.

It follows from what I have said that the plaintiffs are, in my opinion, entitled to succeed in the action, and that, according to the claim in the special case, they are entitled to judgment for the amount mentioned, with costs.

Solicitor for plaintiffs: *Walter Moon.*

Solicitors for defendant: *Maitlands, Peckham & Co.*

F. E.

In re CHARLESWORTH'S TRUSTS.
TEW *v.* BRIGGS.

[1911 C. 1878.]

JOYCE J.
1911
Nov. 16, 21.

Revenue—Estate Duty—Settled Fund—Successive Life Estates—General Power to Settlor's Wife to appoint definite Sum out of Fund—Remainder of Fund in trust for Settlor's Residuary Legatees—Incidence of Duty—Finance Act, 1894 (57 & 58 *Vict.* c. 30), *s.* 6, *sub-s.* 2; *s.* 8, *sub-ss.* 3, 4; *s.* 9; *s.* 14, *sub-s.* 1.

A trust fund was settled in 1897 upon trust to pay the income thereof to the settlor for life and after his death to his wife for life and after the death of the survivor upon trust as to 10,000*l.*, part of the fund, for such persons as the wife should by will appoint, and the remainder of the fund was to fall into the settlor's residuary estate disposed of by his will.

On the settlor's death in 1908 estate duty was paid on the fund. The wife died in 1911, having appointed the 10,000*l.* by her will:—

Held, that the estate duty paid on the settlor's death must be borne rateably by the wife's appointees and the settlor's residuary legatees.

Berry v. *Gaukroger* [1903] 2 Ch. 116, applied.

Note on *Berry* v. *Gaukroger*, p. 322, post.

Adjourned Summons.

By the joint operation of a deed poll by way of settlement dated September 29, 1897, and under the hand and seal of John Barff Charlesworth, the settlor, and of a subsequent deed poll and memorandum of agreement dated respectively May 30, 1905, and July 12, 1905, a sum of 14,000*l.* Consols (representing part of the proceeds of sale of certain shares in the Hong Kong and Shanghai Banking Corporation originally settled) stood at the date of the said memorandum of agreement in the names of Elizabeth Barff Charlesworth (the settlor's wife) and the plaintiff upon the trusts declared by the original deed poll concerning the shares originally settled, which were as follows: "In trust to pay the income thereof to myself the said John Barff Charlesworth during my life and after my decease in case my said wife shall survive me In trust to pay the income thereof to my said wife for life And after the death of the survivor of us In trust to sell the same and as to the sum of 10,000*l.* part of the value thereof or such less sum as the said shares may then realise for

JOYCE J. 1911 — CHARLESWORTH'S TRUSTS, *In re.* TEW *v.* BRIGGS.

such person or persons and wholly or in such share or shares as my said wife shall by her last will and testament appoint . . . . And after the death of the survivor of us the remainder of the said sum above 10,000*l.* forming the value or proceeds of the said shares shall fall into my residuary estate disposed of by my last will and testament." The original deed poll conferred power on the settlor during his life and on his wife if she survived him to direct the trustees to sell the said shares and reinvest the proceeds in trust investments.

The settlor died on February 6, 1908, having appointed his wife and the defendants the Rev. Rawdon Briggs and Claude Leatham executors and trustees of his will (by whom the same was proved), whereby after certain pecuniary and specific legacies he gave and devised his real estate and the residue of his personal estate unto his trustees upon trust as therein mentioned.

Elizabeth Barff Charlesworth died on March 20, 1911, having by her will appointed the plaintiff and the defendant L. S. Stansfield her executors, and after certain specific and pecuniary legacies devised, bequeathed, and appointed all real and personal estate not thereby or by codicil otherwise disposed of to which she should be beneficially entitled or of which she should have power to dispose beneficially by appointment or otherwise at her death unto and to the use of her executors, their heirs, executors, and administrators absolutely upon trust as therein mentioned.

Upon the death of the settlor, the plaintiff and Mrs. E. Barff Charlesworth paid estate duty amounting to 998*l.* 3*s.* 10*d.* on 12,180*l.*, the then value of the 14,000*l.* Consols.

The plaintiff now took out this summons for the determination of the question whether a proportionate or any part of the estate duty so paid should be borne by and retained out of the sum of 10,000*l.* (part of the settled trust fund) appointed by the will of Mrs. E. Barff Charlesworth, or whether the whole of such estate duty should be borne by the residue of the settled trust funds.

Tyldesley Jones, for the plaintiff, stated the case.

Tomlin, for the defendants the executors of Mr. Charlesworth. Estate duty became payable by the trustees of the settlement by

reason of the death of Mr. Charlesworth. Sect. 9, sub-s. 1, of the Finance Act, 1894, applies. The duty is thrown on the settled property rateably—*In re Chisholm* (1); *Berry* v. *Gaukroger* (2)—unless there is something in the instrument outside the Finance Act which clears the shares from the duty by throwing it on any particular part of the fund. There are no words, I submit, in this instrument which exempt the 10,000*l.* from duty, which must accordingly be borne by the two parts of the fund rateably.

Austen-Cartmell, for the defendants the appointees of the 10,000*l.* The appointed fund ought not, I submit, to bear any part of this duty, for two reasons: (1.) because the decision in *Berry* v. *Gaukroger* (2) does not apply, and (2.) because by the deed the settlor has shewn that he did not intend that this fund should contribute to the estate duty payable on his death.

The decision in *Berry* v. *Gaukroger* (2) turned on the fact that the pecuniary and the residuary legatees all became beneficially entitled on the death of the tenant for life and they all became accountable for the whole of the estate duty on the fund, and the doctrine of equitable contribution applied. But in the present case the person who became beneficially entitled on the settlor's death was his wife, and she was entitled to raise the duty on the whole fund, and I submit that there is no equity on her death to apportion the duty. Inasmuch as she survived her husband *Berry* v. *Gaukroger* (2) does not apply because it is based on entirely different facts. In that case the pecuniary legatees became beneficially entitled on the death of the tenant for life, but in this case the persons who correspond to the pecuniary legatees in that case did not become so entitled until the later event, namely, Mrs. Charlesworth's death.

Then on the construction of the deed, and in particular having regard to the last clause of the trust, I submit that the settlor meant the 10,000*l.* to be a clear sum of 10,000*l.* free from duty. It is in effect a charge; but being a charge raisable on her death and not on that of her husband, s. 14, sub-s. 1, of the Act, applied and illustrated in *In re Hacket* (3), does not apply here. On Mrs. Charlesworth's death the trustees have a fund minus the duty

(1) [1902] 1 Ch. 457. (2) [1903] 2 Ch. 116.
(3) [1907] 1 Ch. 385.

JOYCE J. 1911 — CHARLESWORTH'S TRUSTS, *In re.* TEW *v.* BRIGGS.

paid on Mr. Charlesworth's death, and what they have to do is to raise 10,000*l.* out of it to pay that clear sum to the wife's appointees.

JOYCE J. stated the facts and continued: Now in the documents there is no word that I can find which has reference to estate or any other duty. There is no such reference with regard to the sum of 10,000*l.*, nor is there any word shewing that it was to be a "clear" sum or any word of that sort, and I do not follow Mr. Austen-Cartmell's argument that this sum of 10,000*l.* was to be paid free from all deductions.

A question now arises with regard to the incidence of the duty payable on Mr. Charlesworth's death. Why this duty should be borne by one part of the fund and not by the other part I cannot see. In my opinion *Berry* v. *Gaukroger* (1) applies to this case. When the two cases are compared there is no substantial difference between them. I think that the judgment of Cozens-Hardy L.J. is conclusive.

If it is said that there is a charge and that the 10,000*l.* is to be paid first, then s. 14, sub-s. 1, is an answer to that.

If Mrs. Charlesworth had died before her husband and there had been no intervening life estate, I do not see how the duty could have failed to have been apportioned between the two parts of the fund. In my opinion Mrs. Charlesworth's intervening life estate makes no difference, and I hold that the duty must be borne rateably by those who take the 10,000*l.* and those who take the remainder of the settled fund.

Solicitors: *Emmet & Co., for Claude Leatham & Co., Wakefield; Pemberton, Cope, Gray & Co.*

NOTE.—During the arguments in the above case it was suggested that the report of *Berry* v. *Gaukroger* [1903] 2 Ch. 116, as corrected by the errata in that volume, was hardly accurate in speaking of s. 6, sub-s. 4, of the Finance Act, 1894, as imposing accountability for duty.

Sect. 6, sub-s. 2, and s. 8, sub-s. 3, of the Act impose accountability upon the executor, and s. 8, sub-s. 4, imposes accountability upon persons other than the executor; but s. 6, sub-s. 4, merely provides for delivery of an account in cases in which estate duty is not paid by the executor.

(1) [1903] 2 Ch. 116.

R. M.

WEBB *v.* CROSSE.

PARKER J.

1911

[1911 W. 1753].

Nov. 23, 24; *Dec.* 1, 12.

Mortgage—Redemption—Tender by Mortgagor—Disappearance of Trustee-Mortgagee—Stoppage of Interest—Costs of obtaining Vesting Order.

A tender by a mortgagor to a mortgagee of mortgage moneys due need not, in order to prevent further interest running, necessarily be such a tender as would afford a defence to an action at law.

Manning v. *Burges* (1663) 1 Ch. Cas. 29, followed.

But where the tender is made conditional on the execution of a reconveyance, a reasonable time must be allowed to obtain the execution of the deed, especially when the conveying parties are not the persons to whom the tender is to be made.

Wiltshire v. *Smith* (1744) 3 Atk. 89, followed.

As a general rule, the costs of reconveyance fall on the mortgagor, and the costs of obtaining a vesting order of land where the legal estate is in an absconding trustee-mortgagee are no exception to the general rule.

Rourke v. *Robinson* [1911] 1 Ch. 480, and *Schoole* v. *Sall* (1803) 1 Sch. & Lef. 176, distinguished.

The plaintiff, a mortgagor, took out an originating summons, asking that an account might be taken of what was due under and by virtue of a mortgage and further charge dated respectively May 1, 1906, and November 1, 1906, from the plaintiff to the defendants Lionel Crosse and Horace Charles Garrod, and for redemption of the mortgaged property, and that in taking the account the defendants should not be allowed interest after June 29, 1911, the date of a tender of the principal and interest then due alleged to have been made to the defendants and refused by them, and that the defendants should be ordered to pay the costs of the action.

The summons was adjourned into Court and heard by Parker J. on November 23 and 24 and December 1, 1911.

The facts are stated in the judgment of the Court.

Romer, K.C., and *Edward Ford*, for the plaintiff. The plaintiff made a tender of the principal, interest, and costs, but declined to pay the costs of obtaining a vesting order, and the dispute as to these costs has necessitated this action. The tender

PARKER J. 1911 WEBB v. CROSSE.

made was a sufficient tender, and the mortgagees ought to have handed over to the plaintiff a duly executed reconveyance of the mortgaged property together with the title deeds, and as they did not do so, the Court will not allow them interest or costs after the date of the tender: *Rourke* v. *Robinson.* (1) It is the duty of a mortgagee to pay the costs of obtaining a vesting order necessary to complete his title to reconvey, just as he has to pay the costs occasioned by his transferring his mortgage. Here one of the mortgagees has absconded, and the costs of obtaining a vesting order which is thereby made necessary in order that the property may be reconveyed cannot be imposed on the mortgagor. A mortgagor is entitled to receive the reconveyance at the time when he pays the mortgage moneys due.

[PARKER J. If the mortgagee dies intestate, the money has to be paid to his administrators and the heir-at-law has to reconvey. How can the tender be made in his presence?]

The mortgagor prepares the reconveyance and would provide for that difficulty.

[PARKER J. Your tender was conditional on the obtaining of the vesting order; and that is not a good tender at law.]

For this purpose a common law tender is not necessary: *Rourke* v. *Robinson.* (1) "The rights of the mortgagor and mortgagee being correlative, the latter is not entitled to proceed for the deficiency after foreclosure, if, by his own act, as by selling the estate to a stranger, he has prevented the mortgagor from redeeming": Fisher on Mortgages, 6th ed. par. 1968. If a reconveyance is delayed because the mortgagee has lost some of the title deeds, he will have to pay costs: *Lord Midleton* v. *Eliot* (2); *Stokoe* v. *Robson.* (3) In some cases the mortgagor has been made to pay costs caused by the conduct of the mortgagee: *Ex parte Ommaney* (4); *King* v. *Smith* (5); *Wetherell* v. *Collins.* (6) If a mortgagee becomes a lunatic, he can only act through his committee and his estate will have to bear the costs thereby occasioned: *Ex parte Richards* (7); *In re Townsend* (8);

(1) [1911] 1 Ch. 480.
(2) (1847) 15 Sim. 531.
(3) (1815) 19 Ves. 385.
(4) (1841) 10 Sim. 298.
(5) (1848) 6 Hare, 473.
(6) (1818) 3 Madd. 255.
(7) (1820) 1 Jac. & W. 264.
(8) (1847) 2 Ph. 348.

although it is otherwise if the lunatic is to the mortgagor's knowledge a trustee: *In re Lewes.* (1) There is no general rule to be gathered from the authorities; the test seems to be whether or not the mortgagee has behaved reasonably. It is not reasonable that a mortgagee should abscond. That is something which no mortgagor could have contemplated. Nor was it reasonable under the circumstances to serve the notice of sale upon us: Conveyancing and Law of Property Act, 1881, s. 20. The Encyclopædia of Forms and Precedents, vol. viii. p. 902, gives the common form. [They also referred to *In re Jones* (2); *In re Radcliffe* (3); *James* v. *Rumsey* (4); *In re Young and Harston's Contract.* (5)

Hartree, for the defendants. As regards the alleged tender—it is submitted (1.) that in fact no tender was made; (2.) that if there was a tender it was not a good one in law or equity; (3.) that the tender was bad in that it was conditional.

The evidence does not establish that any tender was in fact made. If a tender was made, it was not a proper one because it ought to have been, but was not, made to the persons entitled to receive the money, or to any person having their authority to accept it: Co. Litt. p. 210a (bk. iii. ch. 5, s. 340, 19th ed. by Butler, vol. ii.); *Roberts* v. *Williams.* (6) Equity requires such an unconditional tender as is required at law: *Morley* v. *Bridges* (7); *Evans* v. *Judkins* (8); *Greenwood* v. *Sutcliffe* (9); *Walker* v. *Jones.* (10) As to the liability to pay the costs of the vesting order—if *Rourke* v. *Robinson* (11) is not distinguishable, it is inconsistent with the earlier cases. If *Schoole* v. *Sall* (12) is a decision that the costs of making a title to reconvey must be borne by the mortgagee, that decision is opposed to the well-settled rule established by all the other authorities. It is, moreover, only an Irish case, and is not binding on this Court. The well-settled general rule is that the mortgagor must bear the costs of and incidental to the reconveyance, with certain exceptions,

(1) (1849) 1 Mac. & G. 23.
(2) (1876) 2 Ch. D. 70.
(3) (1856) 22 Beav. 201.
(4) (1879) 11 Ch. D. 398.
(5) (1885) 31 Ch. D. 168.
(6) (1844) 4 Hare, 129.
(7) (1846) 2 Coll. 621.
(8) (1815) 4 Camp. 156.
(9) [1892] 1 Ch. 1.
(10) (1866) L. R. 1 P. C. 50.
(11) [1911] 1 Ch. 480.
(12) 1 Sch. & Lef. 176.

PARKER J. 1911 WEBB v. CROSSE.

namely, in the cases of a lunatic mortgagee, and a trustee-mortgagee where the mortgagor has no actual notice of the trust: *In re Jones.* (1) The mortgagor must pay any costs occasioned by events which are not wilfully brought about by the mortgagee—*e.g.*, if the mortgaged freehold property has, before reconveyance, descended to the lunatic heir of the mortgagee, the costs of obtaining any vesting order necessary must be borne by the mortgagor: *In re Stuart.* (2) The costs of the vesting order are costs of reconveyance, which the mortgagor is bound to pay, and the mortgagees have not been guilty of any misconduct, irregularity, or unfair dealing entitling the mortgagor to repudiate his obligation to pay costs or to have the interest payable by him stopped when he made what he alleges to be a tender.

Romer, K.C., in reply.

Cur. adv. vult.

Dec. 12. PARKER J. This is an action by a mortgagor for redemption, and the plaintiff asks that in taking the usual accounts the mortgagees may not be allowed interest after June 29, 1911, the date of an alleged tender, and may pay the plaintiff's costs of action. If on June 29, 1911, a proper tender was made by the plaintiff and refused by the mortgagees, it would certainly follow that the mortgagees should be disallowed interest after that date and pay the costs, so that the first point I have to decide is the validity of the tender.

The material circumstances appear to be as follows. On May 1, 1906, the defendants Crosse and Garrod lent the plaintiff 1000*l.* on the security of a mortgage in fee simple of certain houses situate at Wells, Somerset, and on November 1, 1906, they lent him a further 150*l.* on the same security. The moneys so lent formed part of the estate of one Thomas William Walker, deceased, and the plaintiff was aware of this fact. In 1908 criminal proceedings for fraud were instituted against Garrod, who thereupon absconded. By an indenture dated March 28, 1911, the defendant Crosse, under the statutory power in that behalf, appointed the defendant Wilfred Walker to be a trustee

(1) 2 Ch. D. 70. (2) (1859) 4 De G. & J. 317.

of the will of Thomas William Walker in the place of the defendant Garrod, and this appointment contained a vesting declaration the effect of which was to vest the moneys secured by the mortgage and the right to receive the same in the defendants Crosse and Walker, but to leave the legal estate still vested in the defendants Crosse and Garrod. (1) On March 29, 1911, the defendants Crosse and Walker, with the intention of putting themselves into a position to exercise their statutory power of sale, gave the plaintiff notice to pay off the principal and interest secured by the mortgage and further charge, intimating that they should proceed to sell the property if payment were not made within three calendar months from the day of notice. The plaintiff, through his solicitor, asked for and obtained an abstract of the mortgagees' title, consisting of the appointment of the defendant Walker as trustee, and thereupon pointed out that an order would have to be obtained to get in the legal estate vested in the defendant Garrod, whose whereabouts was unknown. Some discussion then ensued through the solicitors on either side as to who should pay the costs of obtaining such an order. On June 21 the mortgagees' solicitor left Wells for a short holiday, having, as he thought, arranged with the plaintiff's solicitor that nothing should be done till his return. On June 24 the plaintiff's solicitor called at the office of the mortgagees' solicitor, and in the latter's absence told his managing clerk that the plaintiff was prepared to tender principal and interest, with a reasonable sum for costs of reconveyance, but not the costs of obtaining a vesting order. He did not, however, ask for any appointment for the purpose of making such tender. On June 29, 1911, the plaintiff's solicitor, without having made any appointment, again called at

(1) By s. 12, sub-s. 1, of the Trustee Act, 1893, where a deed by which a new trustee is appointed contains a declaration by the appointor to the effect that any estate or interest in land subject to the trust, or "the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right." But by s. 12, sub-s. 3, "This section does not extend . . . . to land conveyed by way of mortgage for securing money subject to the trust . . . ."

PARKER J. 1911 WEBB v. CROSSE.

the office of the mortgagees' solicitor and told the managing clerk that he had come as a matter of form to tender the principal and interest and three guineas for costs of reconveyance, with an undertaking to pay any further costs of reconveyance, excluding the costs of the necessary vesting order. He also produced a draft reconveyance to which the original mortgagees were made parties, and expressed to reconvey, in consideration of the money paid to them, the defendant Walker not being a party. He intimated that the money he was prepared to tender would only be paid in exchange for a proper reconveyance. The managing clerk pointed out that it was impossible, as the plaintiff's solicitor was well aware, to obtain the execution of the reconveyance by the defendant Garrod, and further that he was managing clerk only and had no instructions what to do. The plaintiff's solicitor had with him the money required to make the tender, but it was not made to any person authorized to receive the money, either conditionally or otherwise.

The question is whether under the circumstances what happened at this meeting was a sufficient tender to prevent interest being thereafter charged in ascertaining the sum on payment of which the mortgagor is entitled to redeem. In my opinion it was not. It is, I think, true that a tender for this purpose need not be such a tender as would afford a defence to an action at law. This appears from the case of *Manning* v. *Burges*. (1) But when such a tender is made conditional on the execution of a conveyance, it is, I think, necessary that a reasonable time shall be allowed to obtain the execution of the conveyance, especially when the conveying parties are not the parties to whom the tender is made. In *Wiltshire* v. *Smith* (2) Lord Hardwicke held a tender to be bad in equity for the purpose of stopping interest because the mortgagee was not allowed a reasonable time to peruse the conveyance which was made a condition of payment.

Whoever may have been right in the controversy as to costs, it was well known to the mortgagor's solicitor that the tender of a conveyance to be executed by the defendant Garrod was useless, and that time would be required to obtain a vesting

(1) 1 Ch. Cas. 29. (2) 3 Atk. 89.

order. The tender was made, however, without giving the mortgagees notice of the mortgagor's intention in that behalf, and on a condition which there was no possibility of the mortgagees being able to fulfil; and it was made to a person not authorized to receive it and who had been given no opportunity to procure authority for that purpose. Under these circumstances I am of opinion that the tender was not such as to deprive the mortgagees of their right in equity to interest any more than it was such as to afford a good defence on the covenant at law.

The question of disallowing interest after June 29, 1911, and of who should pay the costs of this action was, however, argued on somewhat broader grounds. It was contended that the necessity for this action arose from the dispute as to who should pay the costs of the necessary vesting order, and that the mortgagees were wrong in asserting that these costs should be borne by the mortgagor. It cannot be denied that, as a general rule, the costs of reconveyance fall on the mortgagor. It may of course be suggested that where, since the mortgage, the title has become complicated by the acts or omissions of the mortgagee, it is hard on the mortgagor that he should bear the extra costs. But it must be remembered that the mortgagor is asking to be relieved in equity from the legal consequences of his own act, and while on the one hand the Court has always carefully preserved his right to redeem, it has on the other hand only allowed redemption on terms which were fair, if not liberal, to the mortgagee. Thus, the mortgagor always pays the extra costs occasioned by the legal estate having descended to an infant or lunatic heir, or been devised to a trustee who cannot be found, or by reason of the mortgagee having settled the mortgage security: *Ex parte Ommaney* (1); *In re Stuart* (2); *King* v. *Smith* (3); *Wetherell* v. *Collins*. (4)

The practice appears to have varied in the case of extra costs occasioned by the lunacy of the mortgagee himself. It was held in *Ex parte Richards* (5), *In re Townsend* (6), and *In re Wheeler* (7)

(1) 10 Sim. 298.
(2) 4 De G. & J. 317.
(3) 6 Hare, 473.
(4) 3 Madd. 255.
(5) 1 Jac. & W. 264.
(6) 2 Ph. 348.
(7) (1852) 1 D. M. & G. 434.

PARKER J. 1911 WEBB v. CROSSE.

that where the mortgagee became lunatic these costs were payable out of his estate, but in *In re Lewes* (1) that, where the lunatic mortgagee was a trustee and the mortgagor had at the time of the mortgage express notice of this fact, the mortgagor must bear the extra costs. I cannot explain this distinction except on the ground that the rule which threw the extra costs on the estate of a lunatic mortgagee was anomalous and ought not to be extended. It is observable that in *Ex parte Richards* (2) Lord Eldon intimated that the rule did not apply to suits for foreclosure. This emphasizes the anomaly, for obviously the terms on which a mortgagor is admitted to redeem without suit ought to be the same as the Court would impose in a foreclosure action.

Some stress was laid by the mortgagor on *Rourke* v. *Robinson*. (3) Assuming it to be an invariable rule that a mortgagee must, on being paid his principal, interest, and costs out of Court, be prepared to hand over a properly executed conveyance revesting the property in the mortgagor, and that a tender made conditionally on such a conveyance being handed over—at any rate after reasonable time has been given for procuring its execution by the necessary parties—will relieve the mortgagor from further interest, I do not quite see how this affects the question of the costs which the mortgagor ought to pay. If in a foreclosure action he would have to pay the costs of a vesting order, I do not see why he should be relieved from these costs merely because the transaction is carried through without recourse to the Court. No doubt the Court can and will, in settling the terms on which a mortgagor may be allowed to redeem, take into consideration any misconduct on the part of the mortgagee, and sometimes because of such misconduct relieve the mortgagor of interest or costs which but for the misconduct he would have been bound to pay. *Rourke* v. *Robinson* (3) was pre-eminently a case for the exercise of this power. But I cannot see that in the present case the defendants Crosse and Walker have been guilty of any misconduct, and the misconduct, if any, of the defendant Garrod consists, so far as the mortgagor is concerned, in his having gone

(1) 1 Mac. & G. 23. (2) 1 Jac. & W. 264.
(3) [1911] 1 Ch. 480.

away without leaving an address. I do not think a mortgagee is guilty of misconduct merely because he transfers the mortgage debt, retaining the property subject to redemption as trustee for the person to whom the debt is transferred.

Some reliance was also placed by the mortgagor on the Irish case of *Schoole* v. *Sall.* (1) In that case the deeds of the property were not in the hands of the mortgagee, but of his attorney, who claimed a lien, and under these circumstances the Court restrained proceedings at law under the covenant, the money being brought into Court in the foreclosure suit; but it is noticeable that the costs of the proceedings at law and the costs of suit were made payable in the usual way by the mortgagor on redemption. The mortgagee had not been guilty of misconduct merely because his attorney had acquired a lien, or because he had instituted proceedings at law without putting himself into a position to reconvey and deliver up the deeds.

I have come to the conclusion that in this case there is nothing which would justify me in varying the usual terms on which the mortgagor is allowed to redeem.

Solicitors: *Mead & Co., for F. & A. E. Chubb, Wells; Darley, Cumberland & Co., for A. Jefferay Mawer, Wells.*

(1) 1 Sch. & Lef. 176.

F. E.

EVE J.
1912
Jun. 12, 17.

In re SALVIN.
WORSELEY *v.* MARSHALL.

[1903 S. 1431.]

Annuity — Arrears — Interest — Administration Action — Judgment Debt — Practice—Rules of the Supreme Court, 1883, *Order* LV., *rr.* 62, 63.

By a settlement made in 1897 on the marriage of his brother, the testator covenanted to pay to the trustees thereof an annuity of 400*l.* during the joint lives of the brother and his wife. The annuity was paid down to the quarter preceding the testator's death, which took place in October, 1902. After his death an administration action was commenced by the residuary legatees under his will, and accounts and various inquiries were directed. By a certificate of the Master dated April 30, 1908, the arrears of the annuity were found to be 2158*l.* 6*s.* 6*d.*, and the whole arrears were not finally paid until August 24, 1910 :—

Held, that interest was payable at 4 per cent. upon the arrears of the annuity from the date of the judgment, in accordance with the provisions of Order LV., rr. 62, 63, and on such parts as accrued due subsequently to the judgment, from the dates when they respectively accrued due down to actual date of payment in all cases.

The rule of practice stated in *Earl of Mansfield* v. *Ogle* (1859) 4 De G. & J. 38, that, as a general rule, no interest will be allowed on arrears of an annuity, is applicable in the case of a foreclosure or redemption action as between incumbrancers, and as against the property charged, but has no application to the working out of a judgment in an action for the administration of the estate of the grantor of an annuity.

Lainson v. *Lainson* (No. 2) (1853) 18 Beav. 7, followed.

ADJOURNED SUMMONS.

This was a summons taken out on July 8, 1911, by the plaintiffs on the third further consideration of the action which was brought by the residuary legatees of the testator, Bryan John Francis Salvin, for the administration of his estate. The question raised was whether interest was payable on the arrears of an annuity.

The testator died on October 18, 1902. By an indenture dated February 24, 1897, executed on the occasion of the marriage of his brother, the testator covenanted to pay to the trustees therein named an annuity of 400*l.* during the joint lives of the brother and his then intended wife, and during the life of the survivor, by equal half-yearly instalments on every 24th of February and 24th of August. The defendant Edward Gleadows Marshall was the

surviving trustee of this deed. This annuity was duly paid down to and including the half-yearly instalment which accrued due on the 24th of August preceding the testator's death. This action was commenced by originating summons on April 25, 1903, and on July 31, 1903, an order was made in the usual form for the administration of the testator's personal estate. At the date of that order the half-yearly instalment of the annuity due on February 24, 1903, remained unpaid.

By his certificate filed July 12, 1907, the Master certified the debts with interest thereon at 4 per cent. per annum from the date of the judgment down to the date of the certificate as amounting to 2426*l.* 16*s.* 9*d.*, and further certified that in addition to the said debts there were due to the trustees of the indenture of February 24, 1897, arrears of the annuity and a capital sum to represent the annuity as from the death, but that such arrears and capital had not respectively been ascertained. By a further order dated November 12, 1907, further inquiries were directed as to the amount of the arrears and as to the capitalized value of the annuity on the day of the testator's death, and by the certificate filed in answer to such inquiries on April 30, 1908, the arrears—including 57*l.* 5*s.* 3*d.* accrued during the testator's lifetime—were found to be 2158*l.* 6*s.* 6*d.*, and the capitalized value of the annuity at the testator's death to have been 9299*l.* 18*s.* 6*d.* Further arrears accrued after the date of the last-mentioned certificate, but ultimately on August 24, 1910, the arrears were discharged and the future payment of the annuity provided for.

The present summons was for a further distribution of the estate according to minutes, but no provision was made for payment of interest on the arrears of the annuity.

G. R. Northcote, for the plaintiffs. There is a general rule laid down by the case of *Earl of Mansfield* v. *Ogle* (1) that interest is not payable upon the arrears of an annuity unless in the very special circumstances there enumerated: Seton on Judgments, 6th ed. vol. ii. p. 1637. The case of *Martyn* v. *Blake* (2) is referred to there, and it decided that mere legal delay was not

(1) 4 De G. & J. 38; 5 Jur. (N.S.) 419. (2) (1842) 3 D. & War. 125.

EVE J.
1912
SALVIN, *In re.* WORSELEY *v.* MARSHALL.

a sufficient ground to enable the Court to give interest. In the present case the legal proceedings properly instituted were the cause of the delay in payment. It is for those claiming the interest on arrears to take this case out of the general rule.

P. O. Lawrence, K.C., and *J. G. Wood*, for the trustees of the annuity deed. When a judgment has been pronounced in an administration action in which arrears are recoverable, there is a debt found due upon which interest is payable from the date of the judgment: *Lainson* v. *Lainson* (No. 2). (1) It is simply a case of the application of Order LV., rr. 62, 63, to a debt, and it carries interest from the date of judgment. It cannot make any difference where it is a case of a recurring annual sum, payable at fixed intervals. There is no reason for excluding one creditor more than another from interest on his debt, and Kekewich J. was unable to discover the principle upon which the rule here invoked proceeded: *In re Hiscoe*. (2) *Creuze* v. *Hunter* (3) was a different case, and interest was there refused. The case relied upon by the plaintiffs of *Earl of Mansfield* v. *Ogle* (4) was also a different case: that was not an administration action, but one in which a mortgagee sought to redeem prior incumbrances and to foreclose subsequent ones. The claim was not made against the general assets of the grantor. That case was founded on the decision in *Booth* v. *Leycester*. (5) The present is an administration action in which a judgment for these sums has been pronounced as debts. The covenant has ceased and is merged in the judgment.

Edward Ford, for other pecuniary legatees.

G. R. Northcote, in reply, referred to *In re Powell's Trust* (6) and *Jenkins* v. *Briant*. (7)

Cur. adv. vult.

Jan. 17. EVE J., after stating the facts, continued: The action now comes on for further consideration. The bulk of the personal

(1) 18 Beav. 7.
(2) (1902) 71 L. J. (Ch.) 347.
(3) (1793) 2 Ves. Jun. 157.
(4) 4 De G. & J. 38.
(5) (1838) 3 My. & Cr. 459.
(6) (1852) 10 Hare, 134.
(7) (1848) 16 Sim. 272.

estate has been realized, and after discharging the balance of the principal sums due to the creditors with interest there will be a substantial surplus. Out of this surplus the trustees of the annuity deed claim to be paid interest at 4 per cent. per annum on the arrears of the annuity, to be calculated on such part of them as had accrued due at the date of the judgment, from that date, and on such parts of them as accrued due subsequent to the judgment from the dates when they respectively accrued due, and in all cases down to the actual date of payment. This claim seems to be in strict accord with the provisions of Order LV., rr. 62 and 63, but it has been argued on behalf of the pecuniary legatees, who are primarily interested in resisting the claim, that there is a general rule of practice under which interest is only allowed on arrears of an annuity in very exceptional circumstances, that no such circumstances exist here, and, accordingly, that the claim ought not to be allowed.

I am inclined to agree with the contention that if there be any such rule there are no sufficient grounds for not applying it in the present case, but is there, in fact, any such rule applied or applicable in the working out of the judgment in an action of this nature? Apart from authority the existence of such a rule would seem to be consonant neither with good sense nor sound principle, for in what attributes, it may well be asked, does a debt, arising out of a covenant to make a series of periodic payments, differ from one founded on any obligation to pay money where there is no contract or statutory provision as to interest; and if, as would seem to be the case, there is no essential difference between the quality of the two debts, why should the one be treated as outside and the other within the Order I have referred to?

On behalf of the legatees the case of *Earl of Mansfield* v. *Ogle* (1) is cited as authority for the existence of such a rule. I do not think it has any application to the present case. It appears from a report of the case in its earlier stages to which Mr. Wood has been good enough to direct my attention (2) that it was a suit by a mortgagee seeking to redeem prior incumbrances

(1) 4 De G. & J. 38.

(2) (1855) 7 D. M. & G. 181.

EVE J.
1912
SALVIN, *In re.* WORSELEY *v.* MARSHALL.

and to foreclose subsequent ones. In the course of the suit some incumbrances were got rid of as being usurious and void, and by the time further consideration was reached the mortgaged estate had been sold and the proceeds paid into Court, and the first three incumbrancers thereon in order of priority were the plaintiff, a defendant, John Pearce, and one Henry Wheeler. Pearce's incumbrance was in respect of an annuity charged on the estate, and in the course of the suit it was certified that this annuity was in arrear to the extent of 1000*l.* and upwards. On further consideration Pearce claimed to be paid interest on these arrears and Wheeler successfully opposed such claim. Turner L.J., in giving judgment, pointed out that the repayments of an advance by means of an annuity were made up in part of principal and in part of interest, and that in so far as they were made up of interest the allowance of interest thereon would, in fact, be the allowance of interest upon interest, and although there are some observations in his judgment which, if detached from the context and read as being of general application, might go to support the view of the decision pressed upon me on behalf of the legatees, I do not think that is the right way to arrive at a just appreciation of what the case does decide. I think the true result of the decision is this and no more, that in a foreclosure or redemption action, as between incumbrancers and as against the property charged, no interest will, as a general rule, be allowed on arrears of an annuity. Knight Bruce L.J., expressly abstained from expressing what his opinion would have been had the claim been made against the general assets of the grantor, and if the case is to be regarded as an authority for the proposition that in the administration of the estate of the grantor of an annuity the creditor in respect of arrears of such annuity is in a different position from other creditors in that he is excluded from recovering interest on his debt, it would seem to be quite inconsistent with *Lainson* v. *Lainson* (No. 2).(1)

I do not, however, so regard it. The rule stated is a rule applicable to different circumstances and in a wholly different class of action, just as was the case in *In re Hiscoe*.(2)

(1) 18 Beav. 7.

(2) 71 L. J. (Ch.) 347.

The result is that, in my opinion, the claim to interest in this case is well founded and must be allowed.

Solicitors: *Lee & Pembertons; Tarry, Sherlock & King; George Reader & Co., for John McCartan, Durham.*

G. M.

In re DA COSTA.

CLARKE *v.* CHURCH OF ENGLAND COLLEGIATE SCHOOL OF ST. PETER.

[1911 D. 683.]

Will—Construction—Charity—Real Estate—Absolute Gift with Common Law Condition Subsequent—Void—Rule against Perpetuities—Gift Over—Void for uncertainty.

The testator devised all his real estate at Adelaide, South Australia, to trustees upon trust during the lives of successive tenants for life to apply the income in a particular manner, and on the falling in of the last life tenancy to convey the said real estate to the council of the Church of England Collegiate School of St. Peter, Adelaide. But this disposition was made on the express condition that the council published annually a statement of payments and receipts, and in case of default for six calendar months in the publication of such statement, the disposition in favour of the collegiate school was thenceforth to cease and to go over to and enure for the sole benefit of such person or persons and for such public purposes as the Governor-in-Chief of South Australia should in writing direct:—

Held, that the gift over and the condition were both bad, the former not being a good charitable gift, on the authority of *Blair* v. *Duncan* [1902] A. C. 37, and *Grimond* v. *Grimond* [1905] A. C. 124; and the latter being a common law condition subsequent, working a forfeiture on the condition coming into operation, and obnoxious to the rule against perpetuities.

In re Trustees of Hollis' Hospital and Hague's Contract [1899] 2 Ch. 540, followed:—

Held, therefore, that the council of the collegiate school were entitled to a clean conveyance from the trustees of the will, without reference to the condition or gift over.

ADJOURNED SUMMONS.

By his will, dated May 2, 1864, Benjamin Mendes Da Costa, after appointing his sister, Louisa Da Costa, executrix of his will, and bequeathing various pecuniary legacies, gave and

EVE J.
1912
DA COSTA, *In re.*
CLARKE *v.* CHURCH OF ENGLAND COLLEGIATE SCHOOL OF ST. PETER.

devised all his real estate at or near Adelaide, in South Australia, and elsewhere in Australia to his sister, Louisa Da Costa, and three others, upon trust for his sister during her life, and after her decease to divide the yearly rents and profits of the same estates among the nine persons therein named, or such of them as should survive his sister, in certain shares and proportions therein mentioned, and to continue the division during their respective lives, and upon the decease, subsequently to his own death and the death of his sister Louisa Da Costa, of any one or more of them, the nine tenants for life, from thenceforth to pay the share or shares of the tenant so dying to the council for the time being of the Church of England Collegiate School of St. Peter, Adelaide, South Australia, for the general purposes of that institution; and upon further trust upon the decease subsequently to his own and his sister's death of the last survivor of the nine tenants for life, or if he or his sister should survive them all, then immediately after the death of himself and his sister, to convey the said real estate in Australia to the council for the time being of the Church of England Collegiate School of St. Peter aforesaid, or to such persons and in such manner as such council should direct, for the general purposes of such institution, provided also and the testator further directed that the dispositions thereby made in favour of the said collegiate school were so made on the express condition that the council published annually in the Government Gazette or in any one or more of the Adelaide newspapers a statement of payments and receipts for the previous year in respect of the disposition thereby made in favour of the said collegiate school, shewing, first, the gross amount received during the year; second, the amount of charges for collection, disbursement, and management; third, the net income received during the year; and fourth, the amount spent during the year, and such particulars respecting the expenditure as the council for the time being should think fit and material to be published; and in case default should be made for six calendar months in the publication of such statement of accounts, the dispositions thereby made in favour of the said collegiate school should thenceforth cease and wholly determine, and the same dispositions should thereupon "go over to

and enure for the sole benefit of such person, or persons, and for such public purposes as the Governor-in-Chief for the time being of South Australia shall in writing direct."

The testator died on November 26, 1868, domiciled in England, and his will was duly proved in England on January 15, 1869, by his sister, Louisa Da Costa. Louisa da Costa died on February 28, 1898, having survived five of the nine tenants for life and leaving four surviving her. The shares of these tenants for life as they died were paid to the collegiate school. The capital value of the testator's unsold estate in Adelaide or elsewhere was estimated at 110,000*l*. The last of the tenants for life died on July 5, 1910. Thereupon the collegiate school called upon the trustees of the will to convey to the school the unsold real estate, but they were advised that, unless the Court authorized them to make a "clean" conveyance, the conveyance ought to be subject to the condition of forfeiture if and so far as the same was valid. The collegiate school was incorporated by a private Act of Parliament passed by the Legislative Council of South Australia on July 18, 1849, and had power to purchase and hold lands. The English Mortmain Acts did not apply to land in South Australia, and there was evidence that land might be acquired by a charity in that country under a gift made inter vivos or by will.

There was also evidence that the trustees of the school from the date when they received the first share on the death of one of the life tenants published annually in the Government Gazette a statement of the receipts and payments, giving the total amount of payments.

The testator's sister, Louisa Da Costa, was his heiress-at-law, and by her will, dated July 21, 1870, she devised all the real estate at or near Adelaide whereof she might be possessed unto the Governor for the time being of South Australia for the benefit of a Samaritan fund for the benefit of the convalescent patients in connection with the Adelaide Hospital. This will was proved in England on March 21, 1898.

By an originating summons taken out on May 17, 1911, by the present trustees of the will they asked that it might be determined whether the trustees ought to convey the testator's real estate in Australia to the Church of England Collegiate

EVE J.
1912
DA COSTA, *In re.*
CLARKE *v.* CHURCH OF ENGLAND COLLEGIATE SCHOOL OF ST. PETER.

School of St. Peter; and, if so, whether such conveyance ought to be in the form of a "clean conveyance," or whether the condition for forfeiture in the will contained ought to be referred to, and the conveyance made subject to such condition so far as the same might be legal and enforceable.

Stewart-Smith, K.C., and *Hewett*, for the trustees of the will and the heiress-at-law of the testator. The gift over to the Governor of South Australia is bad, being void for uncertainty, according to the decision in *Blair* v. *Duncan*. (1) But the condition is good. It is a gift to a charity for a limited period, until the happening of a certain event. The rule against perpetuities does not apply to a case like this: *In re Randell* (2); *In re Blunt's Trusts* (3); *In re Bowen*. (4) The gift here is to the council of the charity so long as they publish accounts, and it is a valid condition as annexed to the gift to a charity, and in no sense repugnant to it.

Howard Wright, for the Governor of South Australia. If the gift over is held to be bad, there is in substance a gift over to charity, as there is a contingent limitation over from one charity to another, having regard to the terms of the will of the testator's sister, his heiress-at-law. That brings the case within the principle of *Christ's Hospital Trustees* v. *Grainger*. (5)

P. O. Lawrence, K.C., and *F. H. Schwann*, for the collegiate school. Both the gift over and the condition are bad. The gift over is clearly not a good charitable gift, being too vague: *Grimond* v. *Grimond*. (6) It is distinct from the case of *In re Allen* (7), where there was a limitation to a particular place and the charitable bequest was upheld. *Blair* v. *Duncan* (1) is conclusive upon the point. The condition is also bad. It is a true common law condition subsequent and infringes the rule against perpetuities: *In re Trustees of Hollis' Hospital and Hague's Contract*. (8) In that case Byrne J. differed from the statement of the law as expressed in Challis's Real Property, 2nd ed.

(1) [1902] A. C. 37.
(2) (1888) 38 Ch. D. 213.
(3) [1904] 2 Ch. 767.
(4) [1893] 2 Ch. 491.
(5) (1849) 1 Mac. & G. 460.
(6) [1905] A. C. 124.
(7) [1905] 2 Ch. 400.
(8) [1899] 2 Ch. 540.

pp. 174—177, and there are further statements in the 3rd ed. pp. 187, 207: *In re Ashforth.* (1) The council of the collegiate school is entitled to a "clean" conveyance free from any condition.

Howard Wright and *Stewart-Smith, K.C.*, in reply.

EVE J. Is the gift over in this case, being a gift over for the sole benefit of such person or persons, and for such public purposes as the Governor-in-Chief for the time being of South Australia shall in writing direct, a good charitable gift? On the authority of *Blair* v. *Duncan* (2) I hold that it is not. The result is that I have a gift to charity with an executory gift over which is not charitable taking effect at an indefinite time, and in that state of things there is no room for the application of the first rule established in *Christ's Hospital Trustees* v. *Grainger.* (3) But Mr. Howard Wright, who has said all that can properly be said on behalf of the Governor, argues that in substance the gift over is charitable because the person who takes on the condition of defeasance coming into operation has devised her residuary real estate, which would include this real estate, to the Governor of South Australia for a true charitable purpose, and in these events he urges a state of affairs has been brought about to which the rule in question can properly be applied. I think that argument is altogether too far-fetched. What I have to do is to construe this will, and in so doing I am not entitled to control that construction by the provisions of the will of some other testator on whom the estate passing under this will may devolve. I think on other grounds also the gift over in this will is void. It is in my opinion altogether too vague and is void for uncertainty within the principles illustrated and applied in *Grimond* v. *Grimond.* (4)

I have now to consider what is the nature of the gift to the charity. Is it a conditional limitation for an indefinite period, the estate being left to devolve according to law on the event happening which puts an end to the limitation, or is it, as is argued on behalf of the charity, an absolute gift with a common law condition subsequent,

(1) [1905] 1 Ch. 535.
(2) [1902] A. C. 37.
(3) 1 Mac. & G. 460.
(4) [1905] A. C. 124.

EVE J.
1912
DA COSTA, *In re.* CLARKE *v.* CHURCH OF ENGLAND COLLEGIATE SCHOOL OF ST. PETER.

working a forfeiture on the condition coming into operation? What are the terms of the gift? It is a gift to the trustees upon trust, during the lives of successive tenants for life, to apply the income in a particular manner. On the falling in of the last life tenancy the trust is to convey the property to the charity. Then there is a proviso added by which, in certain circumstances, the interest of the charity is to be determined. In my opinion that clause is, as Byrne J. said in the *Hollis Hospital Case* (1), "in terms and form" a true common law condition subsequent, and, such being the case, is void as infringing and being obnoxious to the rule against perpetuities. I think, therefore, the contention of the charity that they are entitled to a clean conveyance and to a declaration that the condition is void prevails, and that I ought to make the declaration and direct the trustees to convey the estate to the collegiate school without reference either to the condition or the gift-over.

Solicitors: *Clarke, Calkin & Son; Freshfields; Bristows, Cooke & Carpmael.*

(1) [1899] 2 Ch. 540, 548.

G. M.

In re EARL OF STAMFORD AND WARRINGTON. PAYNE *v.* GREY.

[1910 S. 2153.]

C. A. 1911 *Nov.* 14, 15, 16; *Dec.* 16.

Will—Construction—Perpetuity—Legal Limitations—Strict Settlement—Power to Trustees to enter during Minority of Tenant in Tail—Omission of Words "by purchase"—Receipt and Application of Rents—Surplus Rents to be applied in Discharge of Incumbrances on other Estates—Implication of Antecedent Estate—Indestructibility—Minority Clause—Invalidity.

The testator devised four estates, three of which he settled to uses in strict settlement under which an infant was now tenant in tail of the C. estate. The fourth estate he limited to trustees for a term of 1000 years upon trust out of the rents and profits to discharge the incumbrances upon all the estates in a certain order, and subject thereto he settled the said estate to the uses of the two estates other than the C. estate. The will contained a provision as to each estate that if any person who, if the provision had not been inserted therein, would for the time being be entitled to the possession or receipt of the rents and profits of such estate as tenant for life or in tail should be under the age of twenty-one years, then and in such case and as often as the same should happen the trustees of the will should enter into possession or receipt of the rents and profits of the estate, and should during the minority of such person keep up the mansion house and manage the property, with power (inter alia) to hold manorial courts and accept surrenders of leases; and should maintain the infant, and apply the surplus rents and profits in the same way as those of the fourth estate. Upon an originating summons to determine the validity of the minority clause Warrington J. held that the trustees in order to enable them to execute the powers given to them by the clause must have by implication a legal estate vested in them antecedent to the estate tail and not capable of being destroyed by barring the entail; that this estate would continue during the whole of the limitations in the will; and that the clause was consequently void for perpetuity:—

Held, on appeal, that there was no necessity for implying any estate at all in the trustees, for that, without any such estate they could enter and take possession and exercise the powers entrusted to them, and the mere inclusion in those powers of one (that of holding manorial courts) which could not be exercised without their having the legal estate did not operate so as to change the whole character of the settlement. At most it was only a power, and not a trust, to do something which the law would not allow. The minority clause was therefore valid.

Decision of Warrington J. [1911] 1 Ch. 255, reversed.

In this case there were two appeals from a decision of Warrington J. (1)

(1) [1911] 1 Ch. 255.

C. A. 1911

STAMFORD AND WARRINGTON (EARL), *In re.* PAYNE *v.* GREY.

The facts sufficiently appear from the report in the Court below, but may be further shortly stated as follows.

Under the will of the seventh Earl of Stamford and Warrington, who died in 1883, four estates, known respectively as the Staffordshire estate, the Leicestershire estate, the Lancashire estate, and the Cheshire estate, were respectively settled (subject to certain trusts during the life of the testator's widow, who died in 1905) in the following way:—The Staffordshire estate was limited by way of legal uses in strict settlement in tail male with remainder in tail general, under which, in the events which had happened, Dame Catherine Sarah Grey (the appellant in the first appeal) was tenant for life in possession, and John Foley Grey was tenant in tail in remainder. The Leicestershire estate was limited to similar uses under which Mrs. Katherine Henrietta Venezia Grey, formerly Duncombe (one of the two appellants in the second appeal), was tenant for life in possession, and Mrs. Butler (the other appellant in the second appeal) and certain other persons were respectively interested in remainder. The Lancashire estate was limited to trustees for a term of 1000 years, the trusts of that term being out of the rents and profits to discharge the mortgages and incumbrances on the four estates in the following order:—Staffordshire first, then Leicestershire, then Cheshire, and lastly Lancashire itself. Subject to that term the Lancashire estate was settled as to one moiety to the uses of the Staffordshire estate, and as to the other moiety to the uses of the Leicestershire estate. The Cheshire estate was settled to uses in strict settlement in tail male, without any remainder in tail general. Under these limitations, in the events which had happened, Roger, the tenth Earl of Stamford, an infant, was now tenant in tail by purchase of the Cheshire estate. The will contained the following clause, revoking the estates of tenants in tail born in the testator's lifetime and limiting in lieu thereof estates for life: "Provided always that if any person to whom an estate tail is hereinbefore devised or appointed should be born in my lifetime then and in every such case I hereby revoke the devise or appointment respectively made to such person and in lieu thereof I give devise and appoint the hereditaments

comprised in the devise and appointment respectively so revoked to the use of the person so hereby made tenant in tail male for his or her life without impeachment of waste with remainder To the use of the first and every other son of such tenant for life successively according to their seniorities in tail male with remainder To the use of the same first and every other son successively according to their seniorities in tail general with remainder To the use of the first and every other daughter of the last mentioned tenant for life successively according to their seniorities in tail general."

The will also contained a minority clause (fully set out in the report in the Court below) which provided that if any person, who, if this clause had not been inserted, would for the time being be entitled to the possession or receipt of the rents and profits of the Cheshire estate as tenant for life or tenant in tail should be under the age of twenty-one years, then and in such case and as often as the same should happen the trustees of the will were to enter into possession or receipt of the rents and profits of the estate, and should during the minority of such person keep up the mansion house and manage the property, with power (inter alia) to hold manorial courts and accept surrenders of leases; and should maintain the infant, and stand possessed of the residue of the rents and profits of the estate upon the same or the like trusts as were thereinbefore expressed and declared of the rents and profits of the Lancashire estate.

The substantial question upon each of the appeals was whether this minority clause, which was not limited in its operation to the case of the infancy of tenants in tail by purchase, was bad for perpetuity or otherwise.

The eighth Earl died in 1890, in the lifetime of the testator's widow, and was succeeded in the title by the ninth Earl.

On the death of the testator's widow in 1905 the Cheshire estate was claimed by one John Grey, who claimed to be the son of the eighth Earl born out of wedlock but legitimated, under the law of Cape Colony, by the subsequent marriage of his parents. He commenced an action in the Chancery Division [1905 G. 249] against (1.) the ninth Earl, (2.) the present Earl, who was the only son of the ninth Earl, and (3.) the infant

C. A. 1911

STAMFORD AND WARRINGTON (EARL), *In re.* PAYNE *v.* GREY.

son of the claimant John Grey for a declaration that the claimant was entitled in possession for his life without impeachment of waste to the Cheshire estates. In that action the ninth Earl counterclaimed for (i.) a declaration that the revoking clause did not apply to the Cheshire estate, and (ii.) a declaration that upon the death of the testator's widow and in the events which had happened the ninth Earl became entitled as tenant in tail male in possession or alternatively as tenant for life in possession to the Cheshire estate. The action was ultimately compromised upon terms which were embodied in the Earl of Stamford's Cheshire Estate Act, 1905, such terms in effect providing for the confirmation of the Cheshire estate to the ninth Earl and his issue, but subject to a charge of a sum of 125,000*l.* secured with interest at the rate of 4*l.* per cent. on the Cheshire estate by means of a term of 2000 years vested in trustees (hereinafter called "the John Grey trustees"), and for the application of the sum of 125,000*l.* in the purchase of real estate to be settled to the use of the claimant John Grey for life with remainder to the use of his infant son in tail male with remainders over. After the expiration of the term and in the meantime subject thereto the Cheshire estate was limited to the use of the ninth Earl during his life without impeachment of waste with remainder to the use of the present Earl in tail male with remainder in the events which had happened to the use of Lady Jane Grey, the only daughter of the ninth Earl, with remainders over.

The ninth Earl on March 23, 1905, executed a disentailing assurance of the Cheshire estate, which deed was duly enrolled. He died in 1910, having had issue two children only, namely, the present Earl, who at that time was fourteen years of age, having been born on October 27, 1896, and Lady Jane Grey, who was eleven years of age, having been born on August 24, 1899. Upon the death of the ninth Earl it was contended by the persons interested in the Staffordshire and Leicestershire estates that, the present Earl being an infant, the minority clause came into operation with regard to the Cheshire estate, and that as against the persons so interested, none of whom was bound by the above-mentioned Estate Act, no part of the rents and profits

of the Cheshire estate could during the minority of the present Earl be applied in keeping down the interest on the 125,000*l.* secured to the John Grey trustees by the Act. The present Earl contended on the other hand, that the minority clause was bad, and an originating summons was taken out by the trustees of the will to have the question determined. The respondents to the summons were the persons respectively interested in the Staffordshire and Leicestershire estates, the present Earl, and the John Grey trustees.

Warrington J. held, on the authority of *Browne* v. *Stoughton* (1) and *Turvin* v. *Newcome* (2), that the minority clause was bad as infringing the rule against perpetuities.

From that decision the persons respectively interested in the Staffordshire and Leicestershire estates appealed.

Upjohn, K.C., H. Terrell, K.C., and *Owen Thompson,* for the persons interested in the Leicestershire estates. The contest in this case is between the persons interested in the Leicestershire and Staffordshire estates on the one hand and those interested in the Cheshire estate on the other. The question is as to the validity of the minority clause. The power of entry given to the trustees is not expressly limited to the case of the infancy of tenants in tail by purchase, and Warrington J. has held the clause to be for that reason bad.

In order to give effect to the powers of management vested in the trustees Warrington J. has implied in the trustees a legal estate antecedent to the estate tail. No larger estate ought to be implied than is necessary to enable the trustees to exercise the powers entrusted to them. In dealing with words which are obscure and ambiguous the Court will, even in a question of remoteness, give weight to the consideration that it is better to effectuate than to destroy the intention. In other words it will construe the words ut res magis valeat quam pereat: *Pearks* v. *Moseley.* (3) Here Warrington J. has unnecessarily implied an estate which has the effect of destroying many of the limitations of the will.

(1) (1846) 14 Sim. 369. (2) (1856) 3 K. & J. 16.
(3) (1880) 5 App. Cas. 714, 719.

C. A. 1911 — STAMFORD AND WARRINGTON (EARL), *In re.* PAYNE *v.* GREY.

There is no need to imply any estate in the trustees at all. It is quite sufficient that the trustees have a legal power, as Chitty J. (as he then was) said in *Dean* v. *Dean* (1), where he laid it down that limitations in a will are not to be interfered with by implying estates except where it is absolutely necessary.

[FARWELL L.J. The question is whether all the powers can be exercised by means of revocation of uses and appointment or some cannot be exercised without a legal estate in the trustees.]

There is no implication at all unless we find something which cannot be done by means of a power. The directions which Warrington J. relied on as shewing that the trustees must have the legal estate were those to hold manor courts and to accept surrenders of leases. But an infant can hold a court of the manor, for it is settled that he can grant by copy of court roll, and that implies a court. The only difficulty is in appointing a steward, but there is no reason why the trustees who are in possession of the infant's estate should not appoint stewards to hold courts in the name of the infant. The power to accept surrenders of leases has been common form for at least a century. An infant can accept a surrender: Sheppard's Touchstone, 7th ed., published in 1820, p. 303; and the trustees may have power to accept surrenders in the infant's name without needing any estate. A power to accept surrenders of leases is given to tenants for life by s. 13 of the Settled Land Act, 1882, and powers very similar to those in this will are given to trustees during minorities by s. 42 of the Conveyancing Act, 1881, and the powers under those Acts operate as common law powers appendant. There is no doubt that these powers would be good if they were confined to the minorities of persons taking estates tail by purchase. But in every case where they affect an estate tail by descent they must be posterior to the estate tail and can therefore be barred, so cannot be void for perpetuity.

But if we are wrong in that and it is necessary to imply some legal estate in the trustees, Warrington J. has implied too much; he has implied an overriding legal estate in fee simple in the trustees, which destroys all the limitations in the will, and indeed makes nonsense of much of it, e.g., the direction

(1) [1891] 3 Ch. 150, 157.

that the power of sale is to be exercised by revocation of uses and new appointment. It would be quite sufficient to imply an estate pur autre vie limited by way of shifting use to the trustees whenever an infant became entitled for life or in tail during his life or until he attained twenty-one. That would be enough to enable the trustees to exercise all the powers, and would be determinable and do much less violence to the limitations in the will.

Shifting uses limited after an estate tail are not subject to the rule as to perpetuity because they can be barred: see Co. Litt. 19th ed. (1832) 327a and 271b, Butler's Notes, and Fearne on Contingent Remainders, 10th ed. vol. i. pp. 254, 255.

Apart from all question the trusts are good because their object is to pay debts. A trust with that object is one of the exceptions from the Thellusson Act, but the exception in that statute is only a statement of what the law was before it. Trusts for accumulation for the purpose of paying debts were always good: *Lord Southampton* v. *Marquis of Hertford* (1); *Bacon* v. *Proctor* (2); *Bateman* v. *Hotchkin* (3); *Briggs* v. *Earl of Oxford* (4); *Tewart* v. *Lawson* (5); Farwell on Powers, 2nd ed. p. 112.

As to the cases relied upon by Warrington J. and in argument before him, in *Marshall* v. *Holloway* (6) and *Browne* v. *Stoughton* (7) there was an overriding legal estate in the trustees; and the trust was for mere accumulation, not for payment of debts. *Floyer* v. *Bankes* (8) cannot be distinguished from *Browne* v. *Stoughton*. (7) *Ferrand* v. *Wilson* (9) was decided on the authority of Lord Eldon's judgment in *Ware* v. *Polhill* (10), and that judgment is not now law: see *Lantsbery* v. *Collier*. (11)

The distinction between an estate which is barrable because it is preceded by an estate tail and one which is antecedent to an estate tail is clearly shewn by *Case* v. *Drosier*. (12)

Levett, K.C., *Cave, K.C.*, and *Sheldon*, for the appellant

(1) (1813) 2 V. & B. 54.
(2) (1822) T. & R. 31, 40.
(3) (1847) 10 Beav. 426.
(4) (1852) 1 D. M. & G. 363.
(5) (1874) L. R. 18 Eq. 490.
(6) (1818) 2 Swans. 432.
(7) 14 Sim. 369.
(8) (1869) L. R. 8 Eq. 115.
(9) (1845) 4 Hare, 344.
(10) (1805) 11 Ves. 257, 283.
(11) (1856) 2 K. & J. 709, 718.
(12) (1837) 2 Keen, 764; (1839) 5 My. & Cr. 246.

C. A. 1911

STAMFORD AND WARRINGTON (EARL), *In re.* PAYNE *v.* GREY.

Lady Grey, who was tenant for life in possession of the Staffordshire estate. In applying the judge-made rule against perpetuity the old lawyers had to deal with the effect of a common recovery. Nothing can be void for perpetuity which could be disposed of by common recovery, hence the distinction between an estate in fee and an estate tail. To make these powers bad the judge had to find a legal estate in the trustees antecedent to the estate tail. We contend that any estate in them could only be subsequent to or contemporaneous with the estate tail. No vested legal estate can be taken away by implication. Implication can only be used to fill up a gap; here there is no gap. Three of the estates are settled directly; that in Lancashire was given for a term and then settled. The judge has by implication taken away legally created estates: see Turner L.J.'s judgment in *Ex parte Hodge.* (1)

If no prior estate in the trustees be implied, then it follows that the clause in question is perfectly good. *Browne* v. *Stoughton* (2), which was relied upon by Warrington J., has been adversely commented on by eminent conveyancers: see 1 Jarman on Wills, 6th ed. p. 313. That case has no application to the present. But even if an antecedent legal estate in the trustees be implied, still the trust being for the purpose of paying debts is perfectly good. The principle of the rule against perpetuities was that property should not be tied up for too long a period, but accumulation for the purpose of paying debts was never held to come within the rule. An exception to that effect was made by s. 2 of the Thellusson Act (39 & 40 Geo. 3, c. 98).

Warrington J. has held that, because the purposes of the provision in question are for the benefit of the other estates and not for that of the Cheshire estate, and because some of the incumbrances may not have been the testator's debts, therefore the case is outside the exception; but those considerations are immaterial.

Sir R. Finlay, K.C., Buckmaster, K.C., and *Tomlin,* for the present Earl, the infant tenant in tail of the Cheshire estate. The private Estate Act has no bearing upon the question before the Court, although it may be material if these appeals should be

(1) (1857) 26 L. J. (Bank.) 77, 83. (2) 14 Sim. 369.

allowed. Any rights which the Earl may have under John Grey ought not to be prejudiced.

In addition to the points urged on behalf of the Earl in the Court below we submit that the revoking clause did not apply to the ninth Earl, who took under the will an estate in tail male which he duly disentailed before the Estate Act was passed. He was therefore at the date of the Act seised of the Cheshire estate in fee simple in possession, and any interest which the appellants may have had under the minority clause was defeated by the disentailing assurance executed by the ninth Earl.

Upon the main question we submit that the Court must first construe the clause and then see if the rule against perpetuities applies. It is necessary in this case to imply a legal estate in the trustees antecedent to the estate tail. In *Davies to Jones* (1) Pearson J., quoting from *Anthony* v. *Rees* (2), says: "When trustees are directed to do anything for the performance of which the legal estate is requisite, they are to have the legal estate."

Under the clause the trustees are bound whenever a minority occurs to enter into possession and receive the rents, and that is to take effect at any time during the whole of the limitations of the will; the whole clause is therefore void for remoteness.

It is clear that for the execution of the power to hold courts of the manors comprised in the settled estates it is essential for the trustees to have the legal estate: Watkins on Copyholds, 4th ed. vol. i. p. 31, vol. ii. p. 17. The same applies to the power to accept surrenders of leases, for there can be no merger of the term unless the surrender be made to the person who has the legal estate. The mortgagee only and not the mortgagor can accept the surrender of a lease. These considerations shew that the legal estate was intended to be in the trustees. If such an estate be implied the clause is bad: Davidson's Precedents in Conveyancing, 3rd ed. vol. iii. pt. i. p. 465.

The case is determined by authority: *Lade* v. *Holford*. (3)

[COZENS-HARDY M.R. referred to Fearne on Contingent Remainders, 10th ed. vol. i. p. 530, and to Gray on Perpetuities, 2nd ed. p. 370.]

(1) (1883) 24 Ch. D. 190, 194.
(2) (1831) 2 Cr. & J. 75, 83.
(3) (1763) 3 Burr. 1416; Amb. 479; 1 W. Bl. 428.

C. A. 1911

STAMFORD AND WARRINGTON (EARL), *In re.* PAYNE *v.* GREY.

It has long been settled that this kind of power is bad unless it is limited to tenants in tail by purchase: *Browne* v. *Stoughton* (1); *Turvin* v. *Newcome* (2); *Cochrane* v. *Cochrane* (3); *Floyer* v. *Bankes*. (4) If the legal estate is in the trustees, then these powers are bad. They are in fact antecedent to the estate tail and not capable of being destroyed by a disentailing deed. If, however, no estate be implied, and the trusts be treated as powers divorced from the estate, they must arise on every occasion when there is an infant tenant in tail and are necessarily bad, because the limits of perpetuity may be exceeded.

Younger, *K.C.*, and *J. E. G. de Montmorency*, for the John Grey trustees, took no part in the argument.

Levett, *K.C.*, in reply. It is not correct to say that the estate tail can only be interrupted by the creation of some antecedent estate in the trustees. The object may be attained by means of shifting uses not based on any precedent estate.

Admitting *Browne* v. *Stoughton* (5) and that line of cases to be good law, the respondent has not dealt with the contention that the trusts are nevertheless good on the ground that they are for the payment of debts: *Lord Southampton* v. *Marquis of Hertford*. (6) As to *Davies to Jones* (7), the Court will not imply an estate the effect of which will be to destroy altogether the intention of the testator. No such implication is necessary here: *Dean* v. *Dean*. (8) Such an implication would, in the words of Turner L.J. in *Ex parte Hodge* (9), "involve something contrary to and in defiance of law," and the Court will not make it.

Cur. adv. vult.

Dec. 16. COZENS-HARDY M.R. The question in this appeal is whether a provision contained in the will, dated June 26, 1875, of the seventh Earl for the application of rents and profits during the minority of any infant tenant for life, or tenant in tail, not confined to tenant in tail by purchase, is void as infringing the

(1) 14 Sim. 377.
(2) 3 K. & J. 16.
(3) (1883) 11 L. R. Ir. 361.
(4) L. R. 8 Eq. 115.
(5) 14 Sim. 369.
(6) 2 V. & B. 54.
(7) 24 Ch. D. 190.
(8) [1891] 3 Ch. 150.
(9) 26 L. J. (Bank.) 83.

rule against perpetuities. The material clauses are set out in the report in the Court below, and it will be sufficient if I indicate shortly the relevant facts.

Under the will the ninth Earl, who died in 1910, was tenant for life in possession of the Cheshire estates, and the tenth Earl is now tenant in tail male by purchase, but he is under age. There is a long series of subsequent limitations. All the limitations are in form legal devises. There is not a devise to trustees to uses. A term of 1000 years is given to trustees in the Lancashire estates, but there is no other express limitation of any kind in favour of the trustees. Wide powers are given to the trustees over the Cheshire estates. The clause in question declares "that if any person who if this present proviso had not been herein inserted would for the time being be entitled to the possession or the receipt of the rents and profits of such settled estate as tenant for life or tenant in tail shall be under the age of twenty-one years then and in such case and as often as the same shall happen" the trustees shall enter into the possession or the receipt of the rents and profits of the same settled estate and during the minority shall continue such possession or receipt and (in substance) manage the estate.

Then follow very wide powers to purchase live and dead stock, to cut timber, and work and get mines and minerals. Amongst the powers is "to hold the courts of and belonging to the several manors" comprised in the settled estate, and to accept surrenders of leases. Subject to the payment of expenses and to keeping down interest on any existing charges on the estate, the trustees are to apply any annual sum they may think fit in or towards the maintenance or education of the minor, and to apply the surplus rents and profits towards the discharge of mortgages and incumbrances on the Staffordshire, Leicestershire, Cheshire, and Lancashire estates.

Warrington J. has held that the trustees take by implication a legal estate anterior to the estate tail, and therefore not capable of being barred by the tenant in tail. If this be the true effect of the will, I agree with the learned judge that the clause in question would be bad. The case of *Browne* v. *Stoughton* (1), decided by

(1) 14 Sim. 369.

C. A. 1911

STAMFORD AND WARRINGTON (EARL), *In re.* PAYNE *v.* GREY.

Cozens-Hardy M.R.

Shadwell V.-C., is directly in point. It is more than sixty years old. I am aware that it has been subjected to severe criticism by very learned conveyancers, but it was followed by Wood V.-C. in *Turvin* v. *Newcome* (1), and has since been approved of by other judges and by leading text-writers. To refuse to follow it in a like case might unsettle titles, and I think it ought now to be considered as laying down the law correctly.

The question remains, however, whether Warrington J.'s construction is correct. Have the trustees any legal estate? And if so, what is it? It is not easy to keep these two questions separate. Warrington J. nowhere defines the precise estate. He contents himself with saying that the trustees must have an estate sufficient to enable them to do what they are told to do, the will being read and construed without reference to the rule against perpetuities. In my opinion there is no justification for implying any legal estate in the trustees. Without any such estate they can enter and take possession and do everything that they are positively directed to do. And the mere inclusion in the powers given to them of one item, namely, a power to hold manor courts, which so far as I am aware they cannot exercise without having the legal estate, has no such operation or effect as to change the whole character of the settlement. At the utmost it is only a power, not a trust, to do something which the law does not allow.

The difficulty of saying what estate the trustees take is, as it seems to me, the most weighty argument against any implication. First, is the legal fee in the trustees from the testator's death, all the limitations being equitable? This seems to me impossible. It is inconsistent with the whole frame of the will, which is the work of a skilled conveyancer. Secondly, is the legal fee in the trustees from the death of the ninth Earl, leaving the tenth Earl an infant? This would make all the subsequent limitations equitable and is equally impossible. Thirdly, is there a recurring limitation under which the trustees take an estate for the life of each minor, terminable on the attainment of twenty-one, and take such an estate toties quoties? A learned conveyancer can work wonders with springing or shifting uses. The well-known

(1) 3 K. & J. 16.

name and arms clause is a good instance. But the law does not allow an estate tail to have interposed in its middle a series of estates pur autre vie. The estate tail may be destroyed, but it cannot be cut about and yet kept alive.

If it is suggested that immediately after each estate pur autre vie a fresh estate tail is to be created by way of springing use, the old estate tail being destroyed, and so on, toties quoties, I think it is sufficient to say that no one ever heard of such a recurring limitation, and I wholly decline to import it into this will. The result is that in my opinion the foundation of the learned judge's judgment disappears. All the limitations are legal. There is no legal estate in the trustees, either antecedent or collateral or subsequent to the estate tail. This being so, it seems clear that the clause is not open to objection. The tenant in tail could bar it. It is collateral to the estate tail.

Mr. Butler's well-known note in 2 Co. Litt., 327a, seems decisive. It is no doubt true that the infant cannot during his minority bar an estate tail, but that is a matter of personal incapacity, which is disregarded in a question of perpetuity: see Gray on Perpetuities, 2nd ed. s. 444. In the view which I take it is not necessary to express any opinion upon the other points raised by the appellants, except to say that in my opinion the trusts of the term are not altogether void. So far as the trust is for payment of debts, it is good: *Lord Southampton* v. *Marquis of Hertford.* (1) No point was made before us as to the trust for maintenance of the present Earl, and I therefore say nothing about it.

There is one matter which I ought to mention. It was argued by the respondent that a clause in the will cutting down the estate of a tenant in tail born in the lifetime of the testator to an estate for life had no application to the Cheshire estates, and ought to be confined to the other settled estates. I have no doubt that the clause as it stands may result in the Cheshire estates being severed from the title. Probably this was a blunder, but we cannot rectify it. The language is too clear. In my opinion the appeal must be allowed.

(1) 2 V. & B. 54, 65.

C. A. 1911

STAMFORD AND WARRINGTON (EARL), *In re.* PAYNE *v.* GREY.

FLETCHER MOULTON L.J. This case has been argued before us most ably and most elaborately, but it ultimately resolves itself into the decision of one or two points of no great complexity. There is no conflict as to the facts. Everything depends on the proper construction of a few clauses of the will of the seventh Earl of Stamford and Warrington.

The testator on his death was possessed of certain estates in Staffordshire, Leicestershire, Lancashire, and Cheshire. In his will they are grouped according to the county in which they are situated. He leaves these shire properties, as he terms them, subject to the incumbrances affecting them respectively to the uses upon and for the trusts, intents, and purposes and with, under, and subject to the powers, provisoes, and declarations thereinafter expressed and declared of and concerning the said shire estates, that is to say, to the use of certain persons named as his trustees during the life of his wife to pay to her or permit her to receive for her separate use the rents and profits of the said shire estates subject to the payment of annuities of 8000*l.* to the Earl of Stamford during the life of the Countess and 12,000*l.* in aid of his personal estate towards the discharge of his funeral and testamentary expenses, debts, legacies, &c. No question arises as to this disposition. The testator's widow died on January 29, 1905.

Subject to the above disposition the testator, after the expiration of the life estate of his wife, left the Cheshire estate in strict tail male with remainder over to the use of the heirs male of the body of Henry, first Earl of Stamford, with remainder to the use of the testator's own right heirs. He left the Staffordshire estate to Catherine Sarah Payne for life with remainder in tail male with remainder to the use of her first and other sons successively according to their seniorities in tail general with remainder in tail male, with remainders over which it is not necessary to refer to. He left the Leicestershire estate to Catherine Henrietta Duncombe for life with remainder in tail male with remainder to her first and other sons successively according to their seniorities in tail general with remainder in tail male, with remainders over which it is also not necessary to refer to. The Lancashire estate he treated differently. He first created and

left to his trustees a term of 1000 years and directed them to apply the rents and profits of the estate during that term, after discharging his funeral and testamentary expenses, debts, &c., to the discharge of the incumbrances on the four shire estates in the following order: the Staffordshire estate, the Leicestershire estate, the Cheshire estate, and the Lancashire estate. After the extinction of the incumbrances on all these estates the term was to come to an end, and the Lancashire estate was left in equal moieties to the same uses as the Staffordshire estate and the Leicestershire estate.

We next find what has been termed in the argument the "management clause." It is upon the construction of this clause that the present case turns. For the purposes of the clause the testator directs that the Staffordshire estate and a moiety of the Lancashire estate shall be treated as one settled estate, the Leicestershire estate and the other moiety of the Lancashire estate shall be treated as another settled estate, and the Cheshire estate shall be considered as a third settled estate. The management clause relates to all the three settled estates as so defined, and it provides that, if any person who but for the insertion of that clause would for the time being be entitled to the possession or the receipt of the rents and profits of such settled estate as tenant for life or tenant in tail shall be under the age of twenty-one, the trustees shall enter into the possession or the receipt of the rents and profits of such settled estate and apply thereout such annual sum as they shall think fit according to the age of such minor towards his maintenance and education (such sum being limited in the case of a person who shall be the Earl of Stamford and Warrington to an annual sum of 3000*l.*, and in the case of any other person whatsoever the annual sum of 1000*l.*) and apply the balance to the reduction of the incumbrances on the shire estates in the same way as they are directed to apply the rents and profits of the Lancashire estate during the term of 1000 years above referred to.

The person entitled at the present time to the Cheshire estates is Roger, tenth Earl of Stamford and Warrington, who was born on October 27, 1896, and is therefore still a minor. If the management clause is valid and takes effect on the Cheshire

C. A. 1911

STAMFORD AND WARRINGTON (EARL), *In re.* PAYNE *v.* GREY.

Fletcher Moulton L.J.

estates he is only entitled during his minority to such sum not exceeding 3000*l.* per annum as may be allowed to him by the trustees, and the balance of the rents and profits go to the reduction of the incumbrances on the shire estates. The extent to which the interest of the infant is involved in the question to be decided by us is shewn by the fact that the Leicestershire estate at the death of the testator's wife was so heavily incumbered that the incumbrances probably exceeded its gross value and were protected by a collateral charge on the Lancashire estate, and in addition the Lancashire estate was incumbered to an extent of over 400,000*l.* The judge of first instance has held that the management clause is invalid and therefore the infant is entitled to all the rents and profits of the Cheshire estate. It is from this decision that the parties interested in the Staffordshire and Leicestershire estates are appealing.

The ground upon which the learned judge has decided that the management clause is void is that in his opinion the provisions compel him to construe the will as granting to the trustees by implication an estate which would render the clause void as offending against the law as to perpetuities. He has arrived at this conclusion in the following way. The trustees are directed to enter into the possession or the receipt of the rents or profits of the estate during the minority of the person who would otherwise be tenant for life or tenant in tail, and they are invested with wide powers of management of the estate, including among other things power to hold the courts of and belonging to the several manors comprised in the same settled estate or any of them, and for the said purposes aforesaid or any of them to retain or employ from time to time such auditors, agents, stewards, bailiffs, &c. Courts can only be held by the lord of the manor, though no doubt he can and ordinarily does this by the steward who actually performs the function of holding the court in the lord's name. The learned judge comes to the conclusion that inasmuch as the trustees are to have power to hold the courts it must mean that they are to have for the time being the legal estate in the manor. Power is also given to the trustees to accept surrenders of leases. Inasmuch as in general no one can accept the surrender of a lease excepting the person entitled

to the reversion, he comes to the conclusion from the existence of this power that during the operation of the management clause, that is during the minority of the tenant for life or tenant in tail, the trustees are intended to possess the legal interest in the real estate. He therefore holds himself bound to imply a legal estate vested in the trustees during the period of such minorities which comes before the tenancy in tail. The powers appendant to it therefore cannot be barred by disentailing deed and operate throughout all minorities of the tenants for life and tenants in tail. He therefore holds the management clause to offend against the rules of law as to perpetuities and to be invalid, and declares the infant to be entitled to the enjoyment and profits of the Cheshire estate as tenant in tail.

There is no doubt that where a testator by his will gives powers to a trustee it is justifiable in general to imply the grant of whatever is essential to the existence of such powers. But a will must be construed as a whole, and if such an implication would contradict the plain language of other parts of the will it may be the duty of the Court to come to the conclusion that they cannot make such an implication, but must accept the alternative that the testator has failed to give that which would be necessary to support the powers, and that therefore he has failed to carry out his intention of giving those powers. I agree with the conclusion of the learned judge in the present case that power to hold the courts of a manor could be validly given to the trustees only by giving to them for the time being the legal estate in the manor itself. I cannot understand how there could be a valid devise of the right to hold a court (at which, for example, presentations might be made of the customs of the manor) to a person who was not to be lord of the manor at the time, and my perplexities have been in nowise lessened by the arguments of Mr. Upjohn, which seemed to me to be attempts to evade rather than to solve the difficulty. I think, therefore, that if it were not inconsistent with other and more important clauses of the will I should presume from the clause giving power to hold courts that the testator intended that for the time being at all events the legal estate should be vested in the trustees. But such an interpretation would to my mind be wholly inconsistent with the main

C. A. 1911 — STAMFORD AND WARRINGTON (EARL), *In re.* — PAYNE *v.* GREY. — Fletcher Moulton L.J.

dispositions of the will. The Cheshire estates, for instance, after the expiry of the life estate are left in tail male so as to go with the title. I agree with the argument that this disposition covered the whole estate remaining after the life estate, and that there is no room for implying an antecedent freehold estate of any kind whatever. The effect of the existence of such an antecedent estate would be to turn the estates thus given from being legal estates to being wholly or partially equitable estates, and this is so wholly inconsistent with the main disposition that I decline to take it as the true interpretation of the will. The implication that it was intended that the trustees should have the legal estate in the manor is after all only an argumentative consequence of a very subordinate power relating only to a probably inconsiderable proportion of the property affected, and it is to my mind infinitely more probable that the draftsman of the will in drafting it and the testator in signing it did not realize these legal subtleties (resting as they do on the intricacies of the law relating to manors, which is a recondite and difficult subject) than that they should have used the plain language of the primary dispositions without intending that it should carry its natural meaning. I have some doubt as to what is the nature of the estate which the learned judge implied, but it would seem to me that the only estate which would serve the purpose would be an estate in fee simple leaving only a beneficial interest to the adult tenant for life or tenant in tail, and this would be a blank contradiction of the language of the main dispositions of the will.

I do not think there is any difficulty of equal magnitude with regard to the power to accept surrenders of leases. If a power of sale can be validly given even at common law to persons not possessing the legal estate I do not see why powers of accepting surrenders of leases should not be so given, and our attention was called to a precedent of old standing in a book of high authority among conveyancers in which this is done in a clause very similar to the one now under consideration. (1) If therefore skilled conveyancers have thought that such powers could be given without the legal estate being necessary to support them, the implication that this

(1) Davidson's Precedents and Forms in Conveyancing (3rd ed.), vol. iii. pt. ii. p. 1094.

particular testator meant to give the legal estate for the time being to his trustees becomes very weak, and the Court is entitled and I think bound to refuse to make such implication where it is clearly inconsistent with the explicit provisions of the remainder of the will.

It remains to consider whether if we reject the suggestion of an antecedent estate in the trustees the management clause is open to any objection on the ground of its offending against the law as to perpetuities. The accepted test as to whether or not provisions such as these offend against the law of perpetuities is whether or not they are in their nature capable of being barred by the common recovery which of old, and the disentailing deed which in the present time, cuts off the entail. Nothing has been advanced before us which makes me doubt that the operation of a clause like this would be barred with the entail, and therefore I see no objection to the validity of the clause on these grounds.

The point which has given me most trouble relates to the disposition of the rents and profits to be received by the trustees. After allowing certain limited sums for the maintenance of the infant the trustees are directed to apply these rents and profits in the discharge of incumbrances on the settled estates in a specific order. The application of a portion to the maintenance of the infant gives me no difficulty. He would be entitled to the whole of the rents and profits if it were not for the presence of the maintenance clause, and therefore the direction that a portion should go to him amounts only to saying that the trustees shall apply part only of the rents and profits and not the whole to the reduction of the incumbrances on the settled estates. But the application of the remainder to the discharge of these incumbrances amounts in substance to an increase in the settled estate the incumbrance on which is discharged, and as this may go on through a long period by reason of a succession of minorities in one estate tail (whatever may happen to the other) it seems to me to offend against the rule as to perpetuities in every essential particular. But in form the payment is in the reduction of incumbrances, and the cases lay down that this is a purpose which excuses that which would otherwise violate these rules, and therefore, though I am of opinion that it opens the door to devices for tying up property in the very way that

C. A. 1911

STAMFORD AND WARRINGTON (EARL), *In re.* PAYNE *v.* GREY.

Fletcher Moulton L.J.

the Courts have sought to prevent, I am compelled to come to the conclusion that the provision is not invalid.

It remains to consider certain further arguments of a different type which were addressed to us on the part of the respondents. In the first place it was contended that what has been called the cesser clause does not apply to the Cheshire estates. If this were so the ninth Earl of Stamford and Warrington would have been the first tenant in tail, and as he executed and duly enrolled a disentailing deed, the management clause even if valid would have ceased to operate, and this would have the same effect so far as the appellants are concerned as if it were invalid. This cesser clause is the usual device by which an estate is tied up for one step further in case a person to whom an estate tail is devised or appointed should be born in the lifetime of the testator. By revoking the existing devise or appointment in such case and devising and appointing to such person for his life and after his life estate in the same way as previously directed the actual devolution of the estate is unchanged, but the power of cutting off the entail is postponed still further. But in this will the cesser clause makes the new or substituted descent of the properties in tail general and not in tail male, thus following the descent originally provided for in the case of the Staffordshire and Leicestershire estates but not in the case of the Cheshire estates. Counsel for the appellants urged with great force that it is impossible to conceive that the mere fact that the first tenant in tail was born in the lifetime of the testator should make the latter abandon the whole scheme of settlement of the Cheshire estates, which originally ensured their going with the title, and substitute a wholly different descent. He therefore presses us to hold that this cesser clause relates only to the Staffordshire and Leicestershire estates and not to the Cheshire estates. I have not the slightest doubt in my own mind that the testator meant that the cesser clause should effect its ordinary purpose and nothing more, and that therefore the draftsman ought to have had one cesser clause for the Cheshire estates and another for the Staffordshire and Leicestershire estates. The latter clause would have been in the form now to be found in the will. But unfortunately the

draftsman has put in one cesser clause only and made it apply to the three estates. However sure we may be that this was not the testator's intention we must abide by the words of the will, seeing that their construction offers no difficulties whatever, and that the only thing which leads one to believe that they do not express the intention of the testator is the extreme improbability that he should ever have had such an intention as that expressed by the words of the will. We cannot correct such a mistake as this and we must take the will as we find it.

It was next argued that a testator if he leaves an estate tail cannot interfere with it in any way, but that it must go on unchanged after the entail has once been started. An interference therefore with the beneficial interests of the persons entitled is not permissible unless it be limited to a time which cannot be longer than that which is permissible in view of the rules as to perpetuities. I cannot think that any such general principle exists. For example it is impossible at the present date to contest the validity of what is known as the name and arms clause. That clause not only interferes with the beneficial interest of persons who would otherwise be the true tenants in tail, but under certain circumstances takes it quite away. I am therefore of opinion that this objection fails.

To sum up, therefore, I am of opinion that the powers given by the management clause are appendant to the estate tail and capable of being barred with it, that we ought not to imply any antecedent freehold estate overriding the estate tail, and that the powers themselves are for valid purposes, and that accordingly the management clause is effective until the entail has been barred. The appeal must therefore be allowed.

FARWELL L.J. It is sufficient for the purposes of my judgment to state that I think it clear that the will contains a devise of the legal estate in the Shire estates to trustees during the life of Lady Stamford, who died in 1905, and after her death devises by way of legal uses of the Cheshire estates in tail male, of the Staffordshire and Leicestershire estates in tail male with remainder in tail general, and of the Lancashire estates to trustees for the term of 1000 years and subject thereto and to

C. A. 1911 — STAMFORD AND WARRINGTON (EARL), *In re.* PAYNE *v.* GREY. — Farwell L.J.

the trusts thereof to the uses thereinafter declared of the Staffordshire and Leicestershire estates in equal moieties. It is also clear that when the testator desired to vest a legal estate in his trustees and to limit an estate to them for a term of years he knew how to do so and did it in express terms: for it is well settled that an immediate devise to uses without a seisin to serve those uses is good and an effectual disposition of the legal estate under the Statute of Uses.

The first point to be considered is one that was not taken in the Court below but is raised here on evidence adduced by leave. The will contains the usual proviso cutting down the estates of all tenants in tail born in the testator's lifetime to an estate for life. The father of the present Earl was born in the testator's lifetime, but it is said that the Cheshire estates were intended as a provision for the title and were limited in tail male, without any remainder in tail general such as is found in the devises of the other Shire estates, and we are asked to say that the clause does not apply to the late Earl, who in fact executed a disentailing assurance duly enrolled, on some ground of general intention. I think the words are too clear to admit of any such exception: the late Earl was in fact a tenant in tail born in the testator's lifetime and the phrase covers both tail male and tail general; and it is not for us to resettle the will because we may think it probable that the testator would have excepted the Cheshire estates from the clause if his attention had been called to the point. We are not dealing with an executory settlement, but with a formal set of legal uses and powers expressed in terms of art.

The next point is that on which Warrington J. has decided the case, and it turns on the provisoes on pages 8 and 9 of the will. Warrington J. has held that these provisoes cannot have full and proper effect unless he reads into the will by implication an estate in the trustees either in fee or for a long term of years out of which the provisoes can take effect, and, having so read into the will this devise, he then holds that all the provisions which it is required to support are thereby rendered void for perpetuity. If such an estate or term, prior to and independent of the estates tail and indefeasible by any tenant in tail by barring the entail, can be so inserted, I think that the

cases cited would require us to hold that he was right. But I am of opinion that no such estate can be implied. (i.) The will contains express devises to the trustees both for the widow's life and for a term of years and is followed in the usual way by direct devises to the use of the tenants for life and tenants in tail without the interposition of trustees: it is almost impossible in such a case to read in a devise which would revolutionize the whole scheme of the will and turn a succession of legal devises into equitable estates. The only possible ground for so doing is necessity: if the provisoes were absolutely nugatory without such an estate, then, subject to my next observations, it might be possible. (ii.) But the necessity for the insertion of the antecedent estate is said to be to give effect to these provisions. If such insertion defeats them the necessity disappears: still more so, if only one or two of the provisions require the estate to support them, while the insertion of the estate destroys them all. When the Court is asked to read a clause into a will by implication it is asked to construe the will so as to give effect to the real intention of the testator implicitly contained in, but not expressed in terms by, the words of the will. It is possible that the testator may have intended to infringe the rule against perpetuities, but the Court would not insert words having that effect unless it was absolutely unavoidable. If the words are plain the Court must construe the will regardless of the law against perpetuity, but the Court is at liberty, in considering what (if any) words which are not expressed are to be implied, to consider their legal effect and to adopt the alternative rule stated in *Martelli* v. *Holloway* (1): "There may be a particular clause in a will which on one construction appears to offend against the law relating to perpetuities, but, if it is fairly capable of another construction which avoids that objection, the latter construction will be preferred, especially if it is found to be in accordance with the general intention of the will." This was acted on by me in *In re Mortimer* (2) and affirmed in the Court of Appeal. (3) (iii.) For reasons stated subsequently, I see no reason for implying any estate at all in the trustees.

(1) (1872) L. R. 5 H. L. 532. (2) [1905] 2 Ch. 502, 506.
(3) [1905] 2 Ch. 511.

C. A. 1911 — STAMFORD AND WARRINGTON (EARL), *In re.* — PAYNE *v.* GREY. — Farwell L.J.

The question then resolves itself into this: Is it necessary to limit the tenants in tail, over whose estates powers to enter and manage during infancy are given to trustees, to tenants in tail by purchase? It must be remembered that the powers of entry and perception of profits are quite distinct from the purposes to which those profits may be applied. The powers may be quite good and yet the objects to take the rents accumulated thereunder may be a class not ascertained within due limits. I am not now considering the latter point, but the validity of the power of entry. The observation of Mr. Davidson that the trust for accumulation should be restricted to tenants in tail by purchase (vol. iii. pt. i. p. 465) is addressed to the object of the accumulation and is intended to extend to the trust generally, because he carries out the settlement in his forms by means of an overriding term. In the present case we are dealing with legal powers engrafted on legal devises in tail. It is well settled that limitations to A. for life with remainder to his first and other sons in tail were as valid at common law as under the Statute of Uses, and no one ever suggested that the possibility that the first tenant in tail or a number of tenants in tail in succession might be infants for a long period of years raised any difficulty: see Gray on Perpetuities, 2nd ed. p. 362. The barrable nature of the estate tail was held sufficient and the Courts provided against such risk of perpetuity as they considered incident to an estate tail by requiring a particular estate of freehold to support contingent remainders and by forbidding limitations to the unborn child of an unborn child. (See the judgments in *In re Ashforth* (1) and *In re Nash.* (2)) The modern rule of perpetuity was not required for legal limitations of real estate until the Statute of Uses rendered possible the creation at law of executory limitations. If then the barrable nature of estates tail renders them free from any objection on the ground of perpetuity notwithstanding the infancy of tenants in tail, no power of entry which is called into existence in respect of and is limited in duration to the continuance of the infancy of the tenant in tail can be obnoxious to the rule: the estate tail is good notwithstanding that, although theoretically barrable,

(1) [1905] 1 Ch. 535, 542. (2) [1910] 1 Ch. 1, 6.

the infancy prevents any such barring in fact: it remains neither more nor less barrable by reason of powers called into existence by reason of and continuing only during the minority. Perpetuity was always an offence in the eyes of the common law as against public policy and the judges have from early times laid down rules in order to defeat any attempt to create a perpetuity. It would be strange if public policy did not forbid the validity of the infant's estate tail but did prevent the existence of any power over it during minority for the benefit of the infant.

I am therefore of opinion that the power of entry and receipt of rents and profits during infancy is good. It is clear that it is a mere power and not an estate: the estate of the infant is not displaced, but the power arises and exists during the minority of the person entitled to possession or receipt of the rents and profits of the estate. It is true that the power is obligatory, but that merely amounts to saying that it is a power coupled with a trust: it is not a trust estate. The testator, having then created in trustees this power of entry and receipt, gives a number of optional powers to such trustees to be executed and effected by them by means of their possession and receipt of rents and profits. It is not suggested that any of such powers require any legal estate to give them validity except the power to accept surrenders of leases and the power to hold courts, to appoint stewards and the like in respect of manors. I feel no difficulty about accepting surrenders: the leases must be surrendered by the lessees to the infant tenant in tail who has the legal estate and the trustees are authorized to accept such surrenders on his behalf. The trustees have not to convey away any legal estate, but merely to ratify on behalf of the infant the acceptance by him of the surrender. But there is more difficulty as to holding courts. It is, however, unnecessary to express any final opinion on the point, for assuming it to be bad, the only result is that one of the numerous optional powers cannot be exercised. Such power is entirely distinct from the others and its invalidity does not affect them in any way.

There remains the trust of the ultimate residue of the rents: this residue is to be held on the trusts declared of the Lancashire estates during the term of 1000 years thereby limited, and if

C. A. 1911 — STAMFORD AND WARRINGTON (EARL), *In re.* PAYNE *v.* GREY. — Farwell L.J.

the ultimate trust had been for a class of persons to be ascertained beyond legal limits such trust would have been bad, and the result would have been, not that the whole power of entry and receipt was bad, but that the ultimate residue of the rents would be undisposed of. But the ultimate trust is for payment of debts and charges on all the four Shire estates in a certain order in which the Cheshire estates come third. This trust will, of course, be determined if and when the estate tail in the Cheshire estates is barred, and the trust itself is valid because it is for payment of debts. Trusts for payment of debts have always been regarded with favour as trusts in performance of duty or for purposes of honesty, whether the debts are the testator's own or created by his ancestors or others, and whether they are charged on the estates limited to the tenants in tail whose rents are being taken for that purpose or on others. The trust is not regarded as a gift to the debtors or the owners of the estates charged, but as the discharge of the obligation of the testator or others who created them; and no question of perpetuity arises because such a discharge cannot be against public policy and because the estates charged are not tied up for any period at all, but can be released at any time when the owners thereof choose to discharge the indebtedness: see *Lord Southampton* v. *Marquis of Hertford* (1) and *Briggs* v. *Earl of Oxford.* (2) It must be remembered that provisions of this nature for the payment of debts were first inserted when a testator's real estate was not subject to the payment of his simple contract debts and when the creation of equitable assets was regarded as meritorious, because equity always regarded creditors with favour and gave the fullest effect to dispositions in their favour, for example, aiding defective executions of powers in their favour.

I am, therefore, of opinion that the powers in question are valid, and Warrington J.'s judgment should be reversed.

Solicitors: *Smith, Fawdon & Low, for Wright, Son & Aysom, Leicester; Maples, Teesdale & Co.; Trower, Still, Parkin & Keeling; Gamlen, Bowerman & Forward.*

(1) 2 V. & B. 54. (2) 1 D. M. & G. 363.

G. A. S.

ATTORNEY-GENERAL *v.* DORIN.

WARRINGTON J.

1911

Nov. 30; *Dec.* 1.

[1911 A. 646.]

Local Government — Street — New Street — Building By-laws — Erection of Houses backing on Highway — Footpath forming Principal Access to Front of Houses — Abandonment of Footpath before Action — Access to Back of Houses from Highway through Openings in Hedge — Width and Construction of Streets — Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 157.

The building by-laws of an urban sanitary authority required that every person who should lay out a new street over 100 feet long should so lay it out that its width should be 36 feet at the least, and that it should be constructed for use as a carriage-road.

The defendant was the owner of certain land which abutted on the east on H. Road and was separated therefrom by an ancient hedge. The road was from eighteen to twenty feet wide and ran north and south. On this land the defendant erected a row of ten houses having their backs to H. Road. Between the backs of the houses and the hedge he left a strip of land about sixteen feet wide. On the west side of the houses the defendant constructed a footpath about 130 feet long which ran along the front of the houses and communicated on the north with H. Road. On the east side of the houses the defendant inserted gates in the hedge giving access to the houses across the strip from H. Road, and drained the houses into a sewer which he had constructed in that road. The action was brought for breach of the by-laws relating to the new streets both as regards H. Road and the footpath. Prior to the issue of the writ the defendant removed the footpath and gave notice of his intention to abandon it:—

Held, that the construction of the footpath would have been an undoubted breach of the by-laws, but that, inasmuch as the defendant had abandoned it before the commencement of the action and was not threatening and intending to make it, there was no ground for granting an injunction.

Held, also, that the by-laws contemplated something in the nature of a physical as distinguished from a mere metaphorical laying out of a new street; that the defendant had done nothing to the road or its boundaries beyond making the communications between it and his houses and draining his houses into the road; and that he had not therefore laid out H. Road as a new street within the meaning of the by-laws.

Observations of Romer L.J. in *Devonport Corporation* v. *Tozer* [1903] 1 Ch. 759, 764, applied.

WITNESS ACTION.

This was an action by the Attorney-General at the relation of the Urban District Council of Hexham, who were the urban

WARRINGTON J.
1911
ATTORNEY-GENERAL v. DORIN.

sanitary authority for the urban district of Hexham within the meaning of the Public Health Act, 1875, against the defendant for breaches of certain of their building by-laws with reference to the width of new streets.

The by-laws in question were made by the urban district council under s. 157 of the Public Health Act, 1875, and were duly confirmed by the Local Government Board. They were, so far as material, as follows:

"1. . . . . 'Width,' applied to a new street, means the whole extent of the space intended to be used, or laid out so as to admit of being used as a public way."

"3. Every person who shall lay out a new street shall lay out such street at such level as will afford the easiest practicable gradients throughout the entire length of such street for the purpose of securing easy and convenient means of communication with any other street or intended street with which such new street may be connected or may be intended to be connected, and as will allow of compliance with the provisions of any statute or by-law in force within the district for the regulation of new streets and buildings."

"4. Every person who shall lay out a new street which shall be intended for use as a carriage-road shall so lay out such street that the width thereof shall be thirty-six feet at the least."

"5. Every person who shall construct a new street which shall exceed 100 feet in length shall construct such street for use as a carriage-road, and shall, as regards such street, comply with the requirements of every by-law relating to a new street intended for use as a carriage-road."

"6. Every person who shall lay out a new street which shall be intended for use otherwise than as a carriage-road, and shall not exceed in length 100 feet, shall so lay out such street that the width thereof shall be twenty-four feet at the least: Provided always that this by-law shall not apply in any case where a new street shall not be intended to form the principal approach or means of access to any building, but shall be intended for use solely as a separate means of access to any premises for the purpose of removing therefrom the contents of the receptacle of any privy, or of any ashpit, or of any cesspool, without carrying

the contents through any dwelling-house or public building, or any building in which any person may be or may be intended to be employed in any manufacture, trade, or business."

"7. Every person who shall construct a new street for use as a carriage-road shall comply with the following requirements:—

"(*a*) He shall construct the carriage-way of such street so that the width thereof shall be twenty-four feet at the least . . . .

"(*c*) He shall construct on each side of such street a footway of a width not less than one-sixth of the entire width of such street . . . ."

"92. Every person who shall intend to lay out a street shall give to the council notice in writing of such intention . . . . and shall deliver a plan and sections of such intended street."

The facts of the case were these. In the district of the urban district council there was before the year 1900 or thereabouts an old occupation road leading from the main road from Hexham to Newcastle to an old residence known as Hudshaw House. It was an ordinary country occupation road from eighteen to twenty feet wide. In 1900 one W. J. Scott, a builder, bought some land lying to the east of this road, which was afterwards called Hudshaw Road, and to the south of the main road; and in the years following 1900 he built two rows of houses, first a row called "Woodlands," which fronted towards the main road, and secondly a row called "Woodside," which fronted south towards a road which he had himself constructed called Front Street and subsequently called Woodside Road. The piece of land on which each of those rows of houses stood was separated from the other by a street called Back Street affording access to the backs of the houses. None of the houses fronted towards the old occupation road. The side of one house in the row called "Woodlands" and the side of one house in the row called "Woodside" were turned towards the occupation road; and that house in "Woodside" had a small garden gate which opened into Hudshaw Road. In 1903 it was found that Hudshaw Road was in a founderous condition, and towards the end of that year the urban district council gave notices under s. 150 of the Public Health Act, 1875, requiring the adjoining owners to make up that road. Those notices were served upon H. A. Scott, the successor in title of W. J. Scott,

WARRINGTON J.
1911
ATTORNEY-GENERAL v. DORIN.

W. Fisher, the owner of Hudshaw House, and S. Atkin, the predecessor in title of the present defendant, who owned land on the west side of Hudshaw Road. The result of that was that Hudshaw Road was made up, and Scott and Fisher contributed their due proportions according to their respective frontages to that expense. Atkin objected to contribute, and ultimately the claim of the urban district council was compromised by the payment by him of 5*l.*, part of his proportion; with a statement that if he were not called upon to pay the whole of his contribution at that time he might afterwards be called upon to pay something further when, if ever, he came to build on his land. In 1907 the defendant, who was a builder, bought Atkin's land. When he bought it it was a strip of land having on it an ancient cottage, called Monks House, which abutted on the main road and was some distance from Hudshaw Road. For all practical purposes in this case it was a vacant piece of ground; it was bounded on the east side, next to Hudshaw Road, by an ordinary thorn hedge, and on the west side by a similar hedge. It was in fact a field surrounded by an ordinary hedge. In January, 1909, the defendant submitted to the urban district council plans for building on the piece of land he had so purchased. Those plans shewed that he proposed to build a row of houses, having an open space on the east side nearest Hudshaw Road, and another open space, rather deeper, on the west side. What is usually called the front of the houses was shewn by the plan to be on the west. He proposed to approach that western front by means of a footpath a few feet wide only, starting from Hudshaw Road, running westward as far as the western boundary of his ground, then turning southwards along the edge of his ground to the southern boundary thereof. The plans submitted to the urban district council were not approved by them, on the ground that they did not comply with the by-laws as to the width of new streets. The urban district council made no further definite statement as to what their particular objections were. The defendant, conceiving that the objection of the district council was unfounded, proceeded to erect his buildings, and they were completed some time in the early part of 1911. He began at the south, and as he completed

his houses, coming towards the north, he planted small privet hedges between each two houses of the row, that is to say, between Nos. 1 and 2, between Nos. 2 and 3, between Nos. 3 and 4, and between Nos. 4 and 5, and he made the footpath above referred to for a distance of about 130 feet, by placing upon the surface of the soil some freestone chippings to the depth of about three or four inches, and some smaller lead chippings on the top of them.

On the eastern side of the defendant's land the houses approached to within sixteen and seventeen feet of the hedge separating the land from Hudshaw Road, leaving a strip of land between sixteen and seventeen feet wide between the nearest walls of the houses and the hedge. In this hedge the defendant inserted a gate in front of each of the houses and made a cement path leading from the gate to the door of each house, and continued a made up path from each gate some two or three feet beyond the hedge into the roadway. He also drained the houses into a sewer which he had constructed in Hudshaw Road and joined this sewer to the sewer of the urban district council.

In February, 1911, the defendant, realizing that the making of the footpath on the west of the houses was probably a breach of the by-laws inasmuch as it exceeded 100 feet in length, had it removed, and on February 27, 1911, his solicitor wrote to the urban district council as follows: "I have now seen Mr. Dorin on your letter of the 23rd inst. He has abandoned any intention of laying out the passage-way on the west side of his property and intends to lay out gardens in front of the houses to the extreme width of his land." On March 9 the urban district council by their clerk wrote a letter in reply in which they took note that the defendant had abandoned his intention of laying out the passage-way and asked that he should give certain undertakings. On March 11 the defendant's solicitor wrote that he could not advise his client to give the undertakings asked for and repeated the statement as to the abandonment by the defendant of his intention to make the passage-way.

In May, 1911, the plaintiff, at the relation of the urban district council, commenced the present action for (1.) a declaration that the defendant was laying out Hudshaw Road as a new street intended for use as a carriage-road in contravention of the by-laws

WARRINGTON J.
1911
ATTORNEY-GENERAL v. DORIN.

by reason of the same not being of the prescribed width; (2.) an injunction requiring the defendant forthwith to widen it to a width of thirty-six feet at the least, or in the alternative for an injunction restraining him from laying it out without having previously delivered to the urban district council in accordance with the by-laws and obtained their approval to proper plans and sections of such street, and from laying it out so that the width thereof should be less than thirty-six feet; and (3.) a declaration that the defendant had constructed the footpath above referred to as a new street exceeding 100 feet in length on his land in contravention of the by-laws by reason of the same not being of the prescribed width and not having been constructed for use as a carriage-road, with consequential injunctions.

The defendant by his defence pleaded that he had not added to or encroached upon Hudshaw Road or in any way altered or interfered with it or (except by making openings in it) the boundary hedge thereof; and submitted that none of the matters aforesaid constituted a laying out by him of the road as a new street within the meaning of the Public Health Act, 1875, and the by-laws. As regards the footpath he pleaded that there was not at the commencement of the action, as the relators well knew, any such street or footpath. He also contended that he had not laid out or constructed any new street within the meaning of the Public Health Act and by-laws or otherwise, and that he was not and had not been under any obligation to comply with or in any way affected by the requirements of the said by-laws relating to new streets.

The action was heard by Warrington J. for Eve J. on November 30 and December 1, 1911.

Cave, K.C., and *W. Mackenzie*, for the plaintiff. The defendant has laid out or is in the course of laying out Hudshaw Road as a "new street" within the meaning of the by-laws. A person by building lines of houses upon a road makes that road a "new street": *Robinson* v. *Barton-Eccles Local Board.* (1) "Lay out" is equivalent to "form" and "lay out and form" as used in the by-laws in that case. When the defendant commenced to build

(1) (1882) 21 Ch. D. 621; (1883) 8 App. Cas. 798.

there were houses on one side of the road, but nothing but a field and a hedge on the other. By building his houses he laid out the road as a "new street" and in so doing committed a breach of the by-laws by not observing their requirements as to the width of new streets. *Devonport Corporation* v. *Tozer* (1) merely decided that the Attorney-General was a necessary party to the action, and it would appear from the facts of that case that there were there no buildings on the opposite side of the road. That case cannot therefore be relied on by the defendant as an authority in his favour.

The footpath constructed by the defendant on his land in connection with his houses was also a "new street" within the meaning of the by-laws: *Attorney-General* v. *Gibb.* (2)

Jessel, K.C., and *Horace Freeman*, for the defendant. At the time of the issue of the writ the defendant had, to the knowledge of the urban district council, abandoned his intention of making the footpath and had removed it. He was not, therefore, then threatening or intending to lay out a new street in contravention of the by-laws. The plaintiff's claim on this part of the case therefore fails: *Lord Cowley* v. *Byas.* (3)

Further, the defendant did not lay out Hudshaw Road as a new street. That was done by Scott when he built his houses on the east side of the road and widened the road. A road may become a street by houses being built on one side only of it: *Attorney-General* v. *Gibb* (2); *Robinson* v. *Barton-Eccles Local Board.* (4) The erection of a wall on one side of a road has been held to define the line of the road and to make the road a new street: *Attorney-General* v. *Rufford & Co., Ld.* (5) Here the defendant has done nothing to lay out the road as a new street. In *Fellowes* v. *Sedgley Urban Council* (6) it was held that even throwing a strip of land between the houses and the road into the road was not laying out a road. The by-laws here contemplate a physical and not merely a metaphorical laying out of the street: see per Romer L.J. in *Devonport Corporation* v.

(1) [1902] 2 Ch. 182; [1903] 1 Ch. 759.
(2) [1909] 2 Ch. 265.
(3) (1877) 5 Ch. D. 944.
(4) 21 Ch. D. 621; 8 App. Cas. 798.
(5) [1899] 1 Ch. 537.
(6) (1906) 70 J. P. 412.

WARRINGTON J.
1911
ATTORNEY-GENERAL v. DORIN.

Tozer (1), where the by-laws were the same as in the present case. The by-laws deal with the physical laying out of a street. It is alleged that the defendant has laid out Hudshaw Road, but he has no right in the soil of that road, and if he were to make the road up so as to comply with the by-laws he would be committing a trespass. As was pointed out by Parker J. in *Attorney-General* v. *Gibb* (2), there may be a laying out of a new street within s. 157 of the Public Health Act, 1875, and yet not within the by-laws. No case, it is submitted, has been made out against the defendant on these by-laws.

Cave, K.C., in reply. If the Court holds that the defendant's contention is correct the effect will be to revolutionize the practice founded on decided cases. *Devonport Corporation* v. *Tozer* (3) did not, it is submitted, alter the law as laid down by the earlier authorities. By reason of the defendant building houses as he did Hudshaw Road became a new street; he has also done certain works in the roadway; he was therefore laying out a new street. What Scott did on the other side of the road was not a laying out of the street: *St. George's Local Board* v. *Ballard*. (4) The houses he built did not front the road, but merely the end house of each row had one of its garden walls abutting on the road. The present case is exactly covered by *Attorney-General* v. *Rufford & Co., Ld.* (5)

[WARRINGTON J. That case was decided before *Devonport Corporation* v. *Tozer*. (3)]

That case turned on its own facts, and the judgment of Collins M.R. is more in accordance with the previous authorities than the dictum of Romer L.J. on which the defendant relies. Hudshaw Road is now the road on which the defendant's houses for all practical purposes front. It is not suggested that the strip of land between the houses and the hedge has become part of the road. By building on his land the defendant has laid out and defined the road: *Roberts* v. *Richards* (6); *Taylor* v. *Metropolitan Board of Works* (7); *Robinson* v. *Barton-Eccles Local Board* (8);

(1) [1903] 1 Ch. 764.
(2) [1909] 2 Ch. 265.
(3) [1903] 1 Ch. 759.
(4) [1895] 1 Q. B. 702.
(5) [1899] 1 Ch. 537.
(6) (1890) 54 J. P. 693.
(7) (1867) L. R. 2 Q. B. 213.
(8) 21 Ch. D. 621, 636.

Hendon Local Board v. *Pounce*. (1) Under the by-laws, the defendant is prohibited from laying out a new street unless he makes it of the prescribed width. The ownership of the soil of the road is immaterial. He must not do on his own land that which would make the road a street unless such street is of the prescribed width. *Fellowes* v. *Sedgley Urban Council* (2) was a very different case from the present. There the person alleged to have laid out the new street had not built at all.

WARRINGTON J. This is an interesting case; one of some difficulty, and of some considerable importance. The plaintiff is the Attorney-General at the relation of the Urban District Council of Hexham; the defendant is a builder, and the action is brought for the purpose of obtaining an injunction, the effect of which would be to ensure—or by which it was desired to ensure—the widening of a certain road in the district, to compel the compliance by the defendant with certain by-laws made by the urban district council under the provisions of the Public Health Act, 1875, with reference to the width of new streets. The main question which I have to decide is whether, according to the true construction of the by-laws, the defendant has laid out or was, at the time of the issue of the writ, intending to lay out a new street of a width other than that provided for by the by-laws. That is the question I have to determine; and in approaching the solution of that question I think it has to be borne in mind that these by-laws are of a penal character, and one must be careful in construing them not to impose upon the person whose compliance it is sought to enforce any greater burden than the by-laws on their fair construction will allow; certainly not to strain the words of the by-laws so as to bring within their ambit something which according to their natural construction would not come within it.

The facts of the case are these. [His Lordship stated the facts as above set forth down to the making up of the road by the urban district council, and continued:] The only thing really material for the present case is that Hudshaw Road was then made up under s. 150 of the Public Health Act, 1875, and was in

(1) (1889) 42 Ch. D. 602. (2) 70 J. P. 412.

WARRINGTON J.
1911
ATTORNEY-GENERAL v. DORIN.

the notices called a "street," and in fact was a street. Nothing, I think, turns on the expression "street" used in those notices by the urban district council. [His Lordship then continued his statement of the facts, observing with reference to the footpath on the west side of the defendant's property that there was no doubt that at the time the defendant made it he intended to continue it the whole length of his row of houses and as the principal means of access to them. He continued:] Now I think I may say at once I have no doubt that if that footpath had been made as the defendant intended, it would have been a breach of the by-laws. I have not read the by-laws yet, and I do not propose to deal at length with those which refer to this part of the case; it is enough to say, having regard to what I shall state presently, that that footpath would in my opinion have been an undoubted breach of the by-laws. The defendant realized that, and before this action was commenced, on February 27 of this year, he removed the materials which he had put down to make the path, and his solicitor wrote a letter to the urban district council, dated February 27. [His Lordship referred to the correspondence between the defendant's solicitor and the clerk of the urban district council, and continued:] The undertakings that were asked for in the letter of March 9 went, I think, beyond anything which the urban district council could properly require under their by-laws. The writ was then issued, and it included in the matters complained of the laying out or intended laying out of this footpath, and asked for an injunction relating to it. I will dispose of this part of the case at once. In my opinion, at the date of the issue of the writ, the defendant had finally abandoned the intention of making the footpath; he had communicated that to the urban district council; he was not threatening or intending at that time to make it; and I think that there was no ground for an injunction. Whatever the result of the rest of the action may be, that part of it at all events must be dismissed.

Now with regard to the other side of the defendant's land. On the side facing Hudshaw Road the defendant had built houses, roughly between sixteen and seventeen feet of the hedge, leaving a strip of land sixteen to seventeen feet wide between the

nearest wall of the houses and the hedge. In the hedge he had made a gate in front of each house as it was completed, with a little cement path leading from the gate up to the door of the house, and there is no doubt, I think, that, having regard to the abandonment of the footpath, the access to the houses will now be from Hudshaw Road. In that sense they will be houses built in or on Hudshaw Road. They face that way, they will be approached from it, and they drain into it, the gateways open on to it, and the paths will be made up as proper approaches from the road to the houses, but the strip in front of the houses has in no sense been made part of the road, nor is it intended by the defendant to make it part of the road. He has left the hedge as the boundary of the road, with no fresh limitation constructed by himself of any kind whatever.

Those I think are all the material facts, and the question is, as I have said, has the defendant on these facts committed a breach of the by-laws, which I now propose to consider. The by-laws are made under the authority of s. 157 of the Public Health Act, 1875. That section is in these terms: "Every urban authority may make by-laws with respect to the following matters; (that is to say,) (1.) With respect to the level width and construction of new streets." To pause there for one moment, what is the meaning in that section of the words "new streets"? That I think is settled for me by *Robinson* v. *Barton-Eccles Local Board* (1) in the Court of Appeal and in the House of Lords. Under that section that which has in one sense been an old road for years may become a new street, because the word "street" is defined by s. 4 of the Public Health Act, 1875, as including any road, lane, or footway, and accordingly this Hudshaw Road was a street within the meaning of that definition. A country road which is thus a street for some purposes and may have been so for years may become a new street by the gradual growing up of buildings on either side of it, and sometimes it may be very difficult to determine at what precise points of time it becomes a new street. In this case, I do not think that the building by Scott in 1900, or the making up of the road by the local authority, turned this street into a

(1) 21 Ch. D. 621; 8 App. Cas. 798.

WARRINGTON J.

1911

ATTORNEY-GENERAL v. DORIN.

new street, but the building by the defendant of his row of houses has in my opinion made it a new street.

So far I am with the plaintiff. But that does not conclude the question; which is not, has the road become a street or a new street, but, has the defendant laid out a new street? The by-laws which are material are the common form by-laws issued under the authority of the Local Government Board. The first one which has any bearing upon this question is by-law 3: "Every person who shall lay out a new street shall lay out such street at such level as will afford the easiest practicable gradients throughout the entire length of such street," and so on—I need not read the rest of it. The point is that the person who lays out a street is to lay it out at certain levels. The next is by-law 4: "Every person who shall lay out a new street"—the same expression, therefore, as in by-law 3—"which shall be intended for use as a carriage-road shall so lay out such street that the width thereof shall be thirty-six feet at the least." That is the by-law which is relied upon by the plaintiff in the present case. He says that the defendant has laid out Hudshaw Road as a new street; that it is intended for use as a carriage-road, and therefore it must be thirty-six feet wide. The next by-laws are not material upon the point with which I am now dealing. They were material only with regard to the point as to the footpath which has gone, but they may throw some light upon the construction of the by-laws. By-law 5 is this: "Every person who shall construct a new street"—now we have another expression—"which shall exceed 100 feet in length shall construct such street for use as a carriage-road, and shall, as regards such street, comply with the requirements of every by-law relating to a new street intended for use as a carriage-road." Then by-law 6: "Every person who shall lay out"—we go back to the old words again—"a new street which shall be intended for use otherwise than as a carriage-road, and shall not exceed in length 100 feet, shall so lay out such street that the width thereof shall be twenty-four feet at the least." Then there are some provisoes which in effect enable a person to lay out a passage to his house intended only for the removal of refuse of a less width than that which is prescribed by the by-laws. I need not, I

think, read those in detail. Then we have in by-law 92 again this expression "lay out." "Every person who shall intend to lay out a street shall give to the council notice in writing of such intention . . . . and shall deliver a plan and sections of such intended street." It is said that "new street" is not used there, that this by-law refers to something different; but "intending to lay out a street" must be a new street; you do not lay out a street which has existed before. I think, therefore, that this by-law 92, in speaking of a person who intends to lay out a street, is referring to the same person as is referred to in by-law 4 as a person who shall lay out a new street. Now the plaintiff says that according to the true construction of those by-laws a person who builds houses on a road or builds a wall on a road, and so does that which for the first time makes the road a new street within the meaning of the Act, is laying out a street although he does nothing on the road itself, although he simply builds on his own land; that if his building on his own land converts that road into a new street he is within the meaning of the by-laws laying out a new street. I confess that if it had not been for authority I should have thought it would have been extremely difficult to justify that construction, and I am supported in that by the opinion of Romer L.J. in *Devonport Corporation* v. *Tozer*. (1) I expressly put it in that form, because this expression of opinion by Romer L.J. was not necessary to the decision of the case. He did express a deliberate opinion, and I think he intended it to be not a mere obiter dictum, but a deliberate opinion as to the proper view of the construction of these by-laws. He said: "With regard to the other point"—that is the point now in question, whether the defendants in that case had infringed the by-laws—"I think Joyce J. also came to a right conclusion. I need not go through these by-laws." (They were the same as in the present case.) "In the course of the argument I ventured to point out that there were several by-laws which had to be construed together, and which throw a light upon the special by-law which is said to have been infringed by the defendants in this case. It appears to me, especially with

(1) [1903] 1 Ch. 759, 764.

WARRINGTON J.
1911
ATTORNEY-GENERAL v. DORIN.

respect to the by-law as to laying out a new street, that if you look at that by-law, coupled with the other by-laws which refer to laying out a new street, it is clear that the by-law in question is dealing with something in the nature of a physical laying out, and not what I may call a metaphorical laying out. They relate to something to be done, or contemplated to be done, on the land in question which is to be the street. It is to be borne in mind that these by-laws have to be very carefully construed, because any infringement of them is in the nature of a criminal offence; and if the plaintiffs wish to assert that an offence has been committed or is threatened by the defendants they must shew clearly which by-law it is which is said to have been or to be about to be infringed. Looking at the by-laws upon which the plaintiffs can alone rely as supporting their views in this case, it appears to me clear, as I have said, that those by-laws do not apply to such a case as we have before us now." I will refer to the facts of that case presently. I only refer to it for the moment for this expression of opinion of Romer L.J., that to lay out a street is to do something in reference to the street itself, not a mere figurative laying out, a doing of something else which makes that which was not a street into a street; that according to his view is not laying out a street. But for the authorities which have been cited on the other side, that, if I may say so with all respect, is the opinion I should have formed upon this by-law by my own unaided judgment; but that is very much strengthened by this expression of opinion of Romer L.J. Now, if that is the right construction of the by-law, there has not been anything done by the defendant here but what Romer L.J. would call a metaphorical laying out of the street; he has done nothing to lay out the street at all; he has not touched the street except to make access from his houses to the street and put his drains under it; all he has done is to construct houses, the effect of which construction makes that road into a new street which was not a new street before. That is all that he has done.

It is said, however, that there are authorities the other way which compel me to come to an opposite conclusion. I do not think they do so at all. I have to draw a certain inference of

fact from the facts before me and to form my opinion as to the construction of these by-laws. If, of course, there were any case cited to me in which it had been distinctly held that the construction which I think right is not the right construction, then I should bow to that authority, because the matter is one which has reference to the general law, and not to a document such as a will or a settlement, which concerns only the persons interested under it. But I do not find any such authority. In the first place, in *Robinson* v. *Barton-Eccles Local Board* (1) the by-law in question was a different one altogether, or rather the question was a different one altogether. The question which the Court there considered was twofold—first, whether the road in question had become a new street and therefore capable of being regulated by by-laws, and, secondly, whether the by-law which had been made in that case enabled the local authority to regulate not the width of the road but the building line of houses on the road. On the first of those two points both the Court of Appeal and the House of Lords came to the conclusion that the road in question had become a new street and was therefore subject to regulations. But the House of Lords came further to the conclusion on the second point that the by-law regulating the width of new streets did not enable the local board to regulate the building line. The by-law there was in these terms: "Every new street shall be laid out and formed of such width and at such level as the board shall in each case determine." That is quite a different thing; it was not a by-law imposing upon a person who occupies a particular position—that is to say, one who is laying out a street—the duty of doing something, but it was a by-law providing in general terms that every new street, however it becomes a new street, whoever does it, shall be laid out and formed of such a width and level as the board shall determine. That seems to me to be a very different provision from the one which I have to interpret here.

Then again *Taylor* v. *Metropolitan Board of Works* (2), which was cited for the plaintiff, turned on a provision in an Act of Parliament, the Metropolis Management Amendment Act, 1862, and the provision there was that no existing road or way, being

(1) 21 Ch. D. 621; 8 App. Cas. 798. (2) L. R. 2 Q. B. 213.

WARRINGTON J.
1911
ATTORNEY-GENERAL v. DORIN.

of less width than forty feet, should after 1862 be formed or laid out for building as a street for the purposes of carriage traffic, unless it were widened to the full width of forty feet. There again that old street became a street by building. It had to be widened, and it had to be widened, therefore, to the full width of forty feet, but the provision in that case was not that which I have to construe in this case.

Then as to *Attorney-General* v. *Rufford & Co., Ld.* (1), that turned upon the meaning of the term "new street" in s. 63 of the Towns Improvement Clauses Act, 1847. That section provided: "It shall not be lawful to make or lay out any new street unless the same be of the prescribed width, or where no width is prescribed, unless the same, being a carriage-road, be at least thirty feet wide, or, not being a carriage-road, be at least twenty feet wide." There was no by-law; the question turned upon the construction of s. 63 of the Act, which provided for the making or laying out of a new street. In that case what the defendants were doing was defining the road in a way in which it had not been defined before, putting buildings on the side of the road where there had been no buildings before. The road would thereby become a new street, and North J. said: "What the defendants are doing is defining the line of the road—I do not use that word in a technical but in a general sense—defining the road along which people are to pass by erecting a wall and altering the state of things so that there will be a wall on each side limiting the width of the road to twenty-one or twenty-two feet. I think that that which will be the line of road between these walls will be a 'new street' within the meaning of s. 63." Therefore what the defendants were doing was making the new street by making the wall there and so defining the road along which people could pass. That was the conclusion to which North J. came in that case.

Then the nearest case to this, because the by-laws in question were the same as those with which I have to deal, was *Roberts* v. *Richards*. (2) There again the question which is before me did not arise, because what the defendant was doing was this. There was a row of houses facing some open land; the owner of that

(1) [1899] 1 Ch. 537, 540. (2) 54 J. P. 693.

open land had sold it, reserving what he called a roadway seven feet wide. The defendant had purchased the land, and had built a wall on the seven-feet line on land which had previously been part of a roadway. The land in question was open land over which there was a road. There had been a road long before the reservation to which I am alluding, used by horses, carts, and carriages, and the defendant built a fresh boundary to that road, and it was held that by so doing he was laying out the road. I think he was, according to the construction which in my judgment ought to be put on the by-laws. He was laying out a road; he was doing something on that which was itself the road; there was not a mere metaphorical laying out in that sense.

Then there is one other case in which the common form by-laws were in question, and that is *St. George's Local Board* v. *Ballard*. (1) Let me see whether that case compels me to come to the opposite conclusion to that to which I should otherwise come. There was a lane running up from a main road; on one side of the lane there was a row of houses, and the defendant built a house abutting on the lane by its side, but facing into the main road from which the lane ran. It was said that by doing so he had made the old lane into a street, that it was therefore a new street, and that he was laying out a new street. The conclusion come to by the Court on the facts was that the defendant was not laying out a new street, and it was therefore unnecessary to discuss the question whether, if what he had done turned the street into a new street, he would be laying it out within the meaning of the by-laws. In fact the construction of the by-laws never really came into question at all. I think that is shewn by the judgment of Lopes L.J., who reserved that matter for further consideration. He said: "It is admitted that the lane was not a street before he did this"—that is before he built the house at the corner. "The question is whether on that state of facts there is evidence from which we ought to infer that he is beginning to lay out a new street along the lane. If there were anything to shew that this house at the corner was the first of a series of houses to be built along the lane, the case might be brought within the by-laws." That is to say the Lord Justice does not

(1) [1895] 1 Q. B. 702, 705.

WARRINGTON J.
1911
ATTORNEY-GENERAL v. DORIN.

consider the construction of the by-laws, but he gives expression to a caution that that question might arise if the defendant did that which he was not doing, and which it was not shewn he intended doing.

I think I have now referred to all the authorities which have been cited, and which were cited in order to induce me to come to the conclusion that I am bound not to adopt that construction which I have already said I think is the proper construction. Not only do I find no authority against it, but I think that *Devonport Corporation* v. *Tozer* (1) is an authority in favour of the construction which I think right to adopt. In that case what happened was this. There was a triangular piece of ground containing about three acres. On one side of that there was a lane—a public highway, which is described as a lane; on the other side was another public highway, the main road from Plymouth to Tavistock. On the triangular piece of ground—I will take the Tavistock Road side for the moment, because that is the most important—facing the Tavistock Road the defendant had built a row of houses and had left, as the defendant has done here, a strip of land between the road and the houses. The houses were not finished at the time of the action, were not ready for occupation, and the only openings into the road which had been made so far were openings through a fence intended for bringing in and taking out the building materials. But I think there is no question, when one looks at the judgments, especially the judgments in the Court of Appeal, that one must come to the conclusion that the defendants there, as here, were building houses in one sense on the road; not actually abutting on the road, but only a narrow strip was left. That appears quite plainly, because it is said there were only thirty-six feet between the further side of Tavistock Road and the edge of the houses. To all intents and purposes they were building a row of houses facing the road; and I think further one must infer that the learned judges in the Court of Appeal came to the conclusion that what they were doing would turn Tavistock Road into a street, because otherwise there would have been no ground for the discussion which arose. Now it is quite true that they did not

(1) [1903] 1 Ch. 759.

decide the case upon this ground; what they decided was that the action was wrongly framed, and they affirmed the judgment of Joyce J. on that ground, and that, of course, was quite sufficient to dispose of the appeal; but they did deal with the other point, and in dealing with it Romer L.J. made use of the expressions which I have already read. Collins M.R. said (1): "We find a plan which, if carried out, will undoubtedly involve the construction of a large number of houses in a row; we find that three houses are practically finished, but not finished in the sense of being ready for occupation, nor is there as yet any occupier, and we find that those houses are separated from the existing highway by a strip of land which belongs to the building owners, which is fenced off from the highway, and through which there is no aperture for persons to pass out from the houses, except through such gaps in the fence as were made for introducing building materials for the purpose of carrying out the building scheme. Under those circumstances it seems to me it is quite impossible to say that the strip in front of these houses has, in any sense, become a street." The only difference there that I can see is that the defendant in this case has made openings into the road, whereas the defendant in that case had not, except for the purpose of his building. I think the facts in that case are the same as the facts in the present, except for that immaterial difference; and that if the by-laws are construed as Romer L.J. and I think Collins M.R. also thought they ought to be construed, then what the defendant in the present case has done is not an infringement of them.

The result is that, with regard to the road, the action must be dismissed upon the ground I have just mentioned. With regard to the footpath, it must be dismissed, because the defendant at the time when the action was brought was not threatening or intending to do the act complained of. I think, therefore, that there must be judgment for the defendant, with the costs of the action.

Solicitors: *King, Wigg, Robertson & Brightman, for J. A. Baty, Hexham; Collyer-Bristow, Curtis, Booth, Birks & Langley, for R. S. Holmes, Newcastle-on-Tyne.*

(1) [1903] 1 Ch. 763.

NEVILLE J.

1912

Jan. 18.

In re MANN.

FORD *v.* WARD.

[1911 M. 1727.]

Will—Construction—Bequest of "Money" at Post Office Savings Bank—Consols purchased with Money on deposit—Whether Consols passed under Bequest.

A testatrix, after directing certain pecuniary legacies to be paid out of "any money" standing to her credit at the Post Office Savings Bank, bequeathed "the residue of such moneys" to A. The will contained a general residuary bequest. The testatrix at her death had cash standing to the credit of her deposit account at the Post Office and also a sum of Consols purchased by her through the Post Office with cash withdrawn from her deposit account, the price of the Consols and the commission being charged as withdrawals in her Post Office deposit book:—

Held, that the Consols did not pass to A. under the above bequest of "money," but fell into the residuary estate.

In re Adkins (1908) 98 L. T. 667, distinguished.

Adjourned Summons.

Maria Mann, widow, by her will, dated December 19, 1907, after appointing the defendant Annie Meyerotte and the plaintiff Thomas Ford and George Wilson executors and trustees of her will, and after bequeathing all her watches, jewels, trinkets, furniture, goods and other chattels "and cash in the house (but not other money or securities for money)" to the defendant Annie Meyerotte absolutely, bequeathed to four named persons and to the said George Wilson a legacy of 10*l.* each, and the testatrix directed that such legacies should be paid "out of any money which may at the time of my decease be standing to my credit at the Co-operative Stores at Stratford or elsewhere and at the Post Office Savings Bank" and bequeathed "the residue of such moneys" to the plaintiff absolutely. And the testatrix, after making several specific devises of freeholds, gave and bequeathed all the residue of her real and personal estate including certain leaseholds and all book debts due and owing to her at the time of her decease in relation to her business "and all moneys then standing to the credit of my business account at my bank or bankers" unto her said trustees upon trust for sale and conversion and to hold the net residue of her real and

personal estate upon trust as to one moiety for the plaintiff and as to the other moiety for William Ward and the defendant William James Ward in equal shares.

The testatrix made a codicil dated December 30, 1907, to her said will whereby she revoked the legacy of 10*l.* to each of the four named persons in her will and in lieu thereof bequeathed a legacy of 10*l.* to four other named persons, and in all other respects confirmed her said will.

The testatrix died in March, 1911, and her said will and codicil were proved by the plaintiff and the defendant Annie Meyerotte alone.

William Ward, one of the residuary legatees named in the said will, died in the lifetime of the testatrix, and the defendant Elizabeth Meyerotte was his sole next of kin.

At the death of the testatrix there was standing to her credit at the Post Office Savings Bank the sum of 203*l.* 2*s.* 11*d.* cash and the sum of 124*l.* 18*s.* 1*d.* Consols. She was also possessed of other personal estate consisting of 41*l.* 1*s.* 6*d.* cash in the house, 48*l.* 7*s.* invested in the Stratford Co-operative and Industrial Society, Limited, household furniture and effects valued at 95*l.* 9*s.* 9*d.*, and the goodwill, stock in trade, and book debts of her business estimated for probate at 672*l.* 14*s.* 10*d.* She was also entitled to real estate. The Consols had been purchased by the testatrix prior to the date of her will through the Post Office Savings Bank pursuant to the provisions of the Savings Bank Acts, 1880 to 1893, out of money standing to her credit in her deposit book, and the dividends on the Consols had from time to time been credited to her in her deposit book. Her name had not been entered in the books of the Bank of England as the proprietor of the stock. Her deposit book contained printed regulations which stated that depositors in the Post Office Savings Bank might invest their deposits in Government stock up to a limit of 500*l.* stock, and that any amount of stock from 1*s.* upward might be sold. The certificates of the investments supplied to the testatrix certified that the sum of stock had been placed on the Savings Bank Investment account of the National Debt Commissioners and had been credited in the Government Stock Register

NEVILLE J. 1912 MANN, *In re.* FORD *v.* WARD.

of the Post Office Savings Bank to her, and that her deposit account had been charged with the purchase price of the stock and the commission. Each certificate had this note at foot: "In the event of the depositor desiring to sell the whole or a portion of the above stock, or to obtain a stock certificate under the National Debt Act, 1870, or to transfer stock into his own name in the books of the Bank of England, he must forward this certificate and his deposit book, with this application, to the Controller of the Post Office Savings Bank."

The summons was issued to determine (inter alia) whether the Consols passed to the plaintiff under the bequest to him of the residue of the moneys standing to the credit of the testatrix at the time of her decease at the Post Office Savings Bank, or whether they passed under the general residuary bequest.

Manning, for the plaintiff. These Consols were purchased out of the money on deposit at the Post Office Savings Bank and could only be transferred or sold through the medium of the Post Office, and the certificate of investment shews that the Consols stand to the credit of the Government Stock Register of the Post Office Savings Bank, and do not stand to her credit in the books of the Bank of England. The case is substantially on all fours with *In re Adkins* (1), where Eve J. held that Consols bought through the Post Office with the cash on deposit there passed under a bequest of "money deposited in the Post Office Savings Bank."

Gurdon, for the defendants. It is submitted that *In re Adkins* (1) is not in accordance with the general current of authority which shews that the word "money" is to be construed in its strict literal sense and means "cash," unless there is something in the context to give it a more extended meaning: Jarman on Wills, 6th ed. vol. ii. p. 1301. When the cash on deposit was withdrawn and invested in Consols the investment was no longer part of her deposit account, and here there is nothing in the context to give a more extended meaning to the word "money." The Consols therefore did not pass under the particular bequest, but fell into the residue. Further, *In re Adkins* (1) is distinguishable. There

(1) 98 L. T. 667.

there was no residuary bequest, and if the Consols had not passed under the particular gift there would have been an intestacy, and the Court leans against an intestacy. Here there is a residuary bequest.

NEVILLE J. 1912 MANN, *In re.* FORD *v.* WARD.

Manning in reply.

NEVILLE J. In this case I think it is impossible for me to attribute to the word "money" used in the gift in question any wider meaning than that which usually attaches to it. In the first place I am unable to apply the reasoning of Eve J. in the case of *In re Adkins* (1) because the language of the will and the circumstances were different from those in this case. Here I have an elaborate will drawn in technical language and distinguishing between "cash in house" and "other money" and "securities for money," and in the residuary clause "money at my bankers," and the testatrix must, I suppose, be taken to have known the different meanings attributable to those expressions used by her. Then the words of the gift in question are these: [His Lordship read the bequest, and continued:] Now she had money on deposit at the Post Office Savings Bank and also a sum of Consols representing the investment of moneys withdrawn from her deposit account at that bank. The price of the Consols and the commission are treated as withdrawals in her pass-book. I think those withdrawals ceased to be part of her money on deposit and she had instead the certificates of the investment certifying that the sum of Consols had been placed on the Savings Bank Investment Account of the National Debt Commissioners to the credit of the Government Stock Register of the Savings Bank. It seems to me therefore that she intended only to pass the cash on deposit at the bank and not the investments that had been previously made by withdrawals from that deposit account. I also think that the existence of the residuary bequest in this will is another reason for distinguishing the present case from *In re Adkins*. (1)

Solicitors: *Paterson, Candler & Sykes; Ellis, Bickersteth & Co.*

(1) 98 L. T. 667.

H. L. F.

PARKER J.
1912
Feb. 2, 16.

In re GREENWOOD.
GREENWOOD *v.* SUTCLIFFE.

[1911 G. 1206.]

Will—Construction—Substitutionary Gift—Will following the Words of the Wills Act, 1837 (1 *Vict. c.* 26), *s.* 33.

A testatrix by her will (made in 1897) gave her residuary estate to trustees, upon trust to convert the same, and to pay four seventeenth parts or shares of the proceeds unto her brother B. for his own absolute use, two seventeenth shares thereof to her brother J. absolutely, one seventeenth share to her niece A., and two seventeenth shares to her nephew S., and after disposing of the other eight seventeenth shares the will provided that if any of these four persons should die in the lifetime of the testatrix without leaving issue living at her death, his or her share should be held in trust for the other beneficiaries. There was no dispute as to this part of the will, but later on it contained the following words:—"I declare that if any of them my said brothers B. and J., my niece A., and my said nephew S., shall die in my lifetime leaving issue, and any of such issue shall be living at my death, the benefits hereinbefore given to him or her so dying shall not lapse, but shall take effect as if his or her death had happened immediately after mine."

S. died before the testatrix, namely in 1906, leaving issue who survived the testatrix, and having made a will.

J. also died before the testatrix, namely in 1909, leaving issue who survived the testatrix, and having made a will:—

Held, following the decision of Joyce J. in *In re Clunies-Ross* [1912] W. N. 33, that the shares of J. and S. did not lapse as undisposed of, but went to their respective legal personal representatives as parts of their respective estates.

In re Gresley's Settlement [1911] 1 Ch. 358, and *In re Scott* [1901] 1 K. B. 228, distinguished.

Sarah Ann Greenwood, who died in 1910, by her will (made in 1897) gave her real estate and her residuary personal estate to trustees, upon trust to convert the same, and "as to the moneys to arise therefrom, hereinafter called the trust fund, Upon trust to pay four seventeenth parts or shares thereof unto my said brother Booth Greenwood for his own absolute use, two seventeenth parts or shares thereof to my brother Joseph Greenwood absolutely, one seventeenth part or share to my niece Abigail Chambers . . . . two seventeenth parts or

shares unto my nephew John Sutcliffe," and after disposing of the other eight seventeenth shares the will provided that if any of these four persons should die in the lifetime of the testatrix without leaving issue living at her death, his or her share should be held in trust for the other beneficiaries. There was no dispute as to this part of the will, but later on it contained the following words:—"I declare that if any of them my said brothers Booth and Joseph, my niece Abigail Chambers, and my said nephew John Sutcliffe, shall die in my lifetime leaving issue, and any of such issue shall be living at my death, the benefits hereinbefore given to him or her so dying shall not lapse but shall take effect as if his or her death had happened immediately after mine."

John Sutcliffe died before the testatrix, namely in 1906, leaving issue one John H. V. Sutcliffe, who survived the testatrix, and having made a will which was proved by his executors.

Joseph Greenwood also died before the testatrix, namely in 1909, leaving issue three persons who survived the testatrix, and having made a will which was proved by his executors.

Booth Greenwood, the executor of the testatrix, took out an originating summons, to which Dorothy J. Sutcliffe and William Roper (the legal personal representatives of John Sutcliffe) and Sarah Ann Bates (one of the next of kin of the testatrix) were made defendants, for the determination of the question whether the shares of John Sutcliffe and Joseph Greenwood lapsed as undisposed of, or were payable to their legal personal representatives as parts of their respective personal estates.

The summons was adjourned into Court and heard by Parker J. on February 2, 1912.

Hugh Bompas, for the plaintiff, stated the facts and the question for decision.

P. F. Stokes, for the defendant Bates. There is no effective substitutional gift to the legal personal representatives of the two deceased legatees, and the shares given to them by the will do not form parts of their estates.

Sect. 33 of the Wills Act, 1837, provides that where any "child or other issue of the testator to whom any real or personal

PARKER J.
1912
GREENWOOD, *In re.*
GREENWOOD *v.* SUTCLIFFE.

estate" is "devised or bequeathed . . . . shall die in the lifetime of the testator leaving issue, and any such issue . . . . shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will." The Legislature, of course, could make such a provision, and did so in the case of gifts to children or other issue of the testator, but not in any other case. The effect of the section is to confer on a child or other issue who dies before his father, the testator, himself leaving issue who survive the testator, a power to dispose of the property; and the statute by the fiction of his surviving his father postpones the period during which he may become entitled to property to a date after his father's death: *In re Scott.* (1) But although the Legislature can bring about this result, it is not competent for a testator to do so by simply saying that there shall be no lapse and using the words of the Act. In order to prevent the lapse of a gift to a person who is not a child or other issue of the testator there must be a gift to some one else. No rule is more established than that, except in a case within s. 23 of the Act, a testamentary disposition must lapse by the death of the legatee in the lifetime of the testator, and that the only way to prevent the effect of the lapse is by substituting by the will some other person in the room of the legatee dying: *Toplis* v. *Baker.* (2) And the substituted legatee must be clearly pointed out: *Palin* v. *Hills.* (3)

Where there was a gift to a brother and sisters of a testatrix, with a proviso that if one of them should die in the lifetime of the testatrix or of her husband, leaving issue at the decease of the survivor of the testatrix and her husband, the gift should "take effect as if my said brother or sisters respectively had died immediately after the death of the survivor of myself and my said husband," Swinfen Eady J. said that the testatrix had attempted to import and apply the provisions of s. 33 of the Act to her gift,

(1) [1901] 1 K. B. 228.
(2) (1787) 2 Cox, 118.
(3) (1834) 1 My. & K. 470. This case, after being frequently dissented from, was finally overruled in *In re Clay*, [1885] W. N. 22; 54 L. J. (Ch.) 648.

in a case where they were not applicable, and held that the provisions of the section were only applicable and had "only a statutory effect in the case of gifts to issue," and that, as the statute was inapplicable and there was not any substituted legatee, the gift failed: *In re Gresley's Settlement.* (1) In the present case, also, there is an attempt to do what only the statute can do. [He also referred to Davidson's Conveyancing Precedents, 3rd ed. vol. iv. pp. 42, 43, 107; *Johnson* v. *Johnson* (2); *In re Coleman and Jarrom.* (3)]

J. M. Gover, for the defendants Sutcliffe and Roper. This is not a question of the Wills Act, but whether the words of the will are sufficient to shew an intention that there should be no lapse in the events which have happened, but that the shares of the deceased legatees should form parts of their estates. Clauses like this have for years been common forms: see Sweet's Concise Precedents in Conveyancing, 2nd ed. (1845) pp. 339, 360; Bythewood and Jarman's Conveyancing, 4th ed. vol. vii. p. 799, 3rd ed. (1849) vol. xi. pp. 203, 509; Encyclopædia of Forms and Precedents, vol. xv. pp. 475, 576, 619; Key and Elphinstone's Conveyancing Precedents, 9th ed. vol. ii. pp. 773, 774, 791, 830, 882.

A mere direction that the gift is not to lapse is, of course, inoperative, but the substitutionary gift which is required need not be to specified persons: *Sibley* v. *Cook.* (4)

Assuming *In re Gresley's Settlement* (1) to have been correctly decided, it is distinguishable from the present case, as the gift there was to a class.

Joyce J. has held, on similar words, that the gift did not lapse, but was given to the legal personal representatives of the donee as part of her personal estate: *In re Clunies-Ross.* (5) [He also referred to *In re Valdez's Trusts* (6); Jarman on Wills, 6th ed. vol. i. p. 453.]

Cur. adv. vult.

Feb. 16. PARKER J. In this case the testatrix devised and bequeathed her real and personal estate to trustees upon trust for conversion and to divide the proceeds into seventeen parts,

(1) [1911] 1 Ch. 358.
(2) (1843) 3 Hare, 157.
(3) (1876) 4 Ch. D. 165.
(4) (1747) 3 Atk. 572.
(5) Now reported [1912] W. N. 33.
(6) (1888) 40 Ch. D. 159.

PARKER J. 1912 GREENWOOD, *In re.* GREENWOOD *v.* SUTCLIFFE.

of which she gave four seventeenths to her brother Booth Greenwood, two seventeenths to her brother Joseph Greenwood, one seventeenth to her niece Abigail Chambers, and two seventeenths to her nephew John Sutcliffe. She then proceeded to provide for the event of any of these legatees dying in her lifetime without leaving issue, and, later in the will, for the event of any of them dying in her lifetime leaving issue any of whom should survive her. No difficulty arises as to the provision made by the testatrix in the former event, but doubts have been suggested as to what the testatrix intended by the provision made in the latter event. The words are as follows: "If any of them my said brothers Booth and Joseph, my niece Abigail Chambers, and my nephew John Sutcliffe shall die in my lifetime leaving issue, and any of such issue shall be living at my death, the benefits hereinbefore given to him or her so dying shall not lapse but shall take effect as if his or her death had happened immediately after mine."

In construing a gift of this nature it must be remembered that the general law does not allow a legatee who predeceases the testator to take any benefit under his will. In that event the gift is said to lapse, with the consequence that it falls into residue, or if it is itself a share of residue, goes to the testator's next of kin. It is not competent to a testator to exclude the application of this rule of law, but the consequences of a lapse can be avoided by the substitution of some other legatee to take the legacy if the event which occasions the lapse occurs. Such a substitutionary gift is often introduced by a direction that the legacy is not to lapse but is to go to the substituted legatee. In such a case the introductory words are of course quite inoperative unless followed by the substitution of another legatee, but if so followed they are not construed as an attempt to exclude the rule of law as to lapse, but as indicating an intention to avoid the consequences which a lapse would otherwise entail by substituting another legatee. A good instance of this construction will be found in the case of *Sibley* v. *Cook.* (1)

In the present case, apart from authority, it seems to me to be reasonably clear that the testatrix is providing that, in the event

(1) 3 Atk. 572.

she is contemplating, the benefit of the gift, which the legatee cannot take because of the general law, is to go to the person or persons who would have benefited thereby if the legatee had survived her and died immediately afterwards. I see no objection to such a provision on the ground of uncertainty. A testator may provide that if a legacy to A. shall lapse it shall go to A.'s legal personal representatives. Such a provision will be good, though it may be open to question whether on the terms of the particular will legal personal representatives are to be construed strictly so that the gift enures for the benefit of A.'s residuary legatees, or are to be construed as meaning A.'s next of kin: see *Bridge* v. *Abbot* (1), *Palin* v. *Hills* (2), and *In re Clay.* (3) Similarly a testator may, I think, provide that if a legacy to A. shall lapse it shall go to the persons who would have taken the benefit of it on the hypothesis that the legatee survived the testator and died immediately afterwards, or died intestate immediately afterwards, or that the testator's death occurred immediately before the death of the legatee. In any of those cases the persons to take could be readily ascertained, though they might not be the same persons in each case, and it must be remembered that in every case the persons to take will take under the testator's will and not under the will or intestacy of the legatee, and will be just as liable to the general law as to lapse as was the original legatee.

It is said, however, that I am not at liberty to put this construction on the will, because of the decision of the Court of Appeal in *In re Scott.* (4) This was a decision as to the meaning and effect of the 33rd section of the Wills Act, and is of course binding on me as to the true meaning and effect of that section. But I do not think it is binding on me as to the meaning and effect of a clause in a particular will, even though such clause may be almost word for word the same as the section in question. The Legislature can do anything. If it enacts that a gift shall not lapse, it will not lapse notwithstanding the general law. The case in question merely decides that the Legislature meant what it said as to certain gifts not lapsing, and that the words of

(1) (1791) 3 Bro. C. C. 224.
(2) 1 My. & K. 470.
(3) 54 L. J. (Ch.) 648.
(4) [1901] 1 K. B. 228

PARKER J. 1912 GREENWOOD, *In re.* GREENWOOD *v.* SUTCLIFFE.

explanation which follow did not have the effect of substituting other legatees for the primary objects of the testator's bounty. In construing, however, the provisions of a will we must start from the fact that the testator, unlike the Legislature, is unable to overrule the general law, and where, after a direction that a gift is not to lapse, there are found explanatory words such as are contained in the 33rd section of the Wills Act, it appears to be in accordance with common sense and sound canons of construction alike to look upon them not as intended to indicate what the testator thinks will be the result of actually preventing a lapse, which he cannot do, but what his wishes are in case a lapse actually takes place. I do not think, therefore, that the case cited binds me to put on the will in the present case a construction which I should not have put on it apart from authority.

I was also pressed with the decision of Swinfen Eady J. in *In re Gresley's Settlement.* (1) In that case no question of lapse could arise at all, for the gift was to named persons, or such of them as should be living at the death of the survivor of the testatrix and her husband. In other words, in the events which happened it was a class gift. The will, however, contained a proviso which the learned judge construed as an attempt to enlarge the class by the inclusion of a person who predeceased the testator. I doubt whether such a case can have any bearing at all on the construction of a clause obviously designed to prevent the consequences of a lapse. On the other hand, the decision of Joyce J. in *In re Clunies-Ross* on January 26, 1912 (2), is an express authority in favour of the validity of such a clause as I have to construe in the present case.

I hold, therefore, that there is no intestacy, but a good substitutionary gift in favour of the person or persons who would have taken if the legatee had survived the testatrix, and died immediately afterwards. I am glad to come to this decision, for there can be no doubt that clauses such as we have in the present case have become almost common form clauses in wills.

Solicitors for all parties: *Ridsdale & Son, for Sutcliffes, Hebden Bridge.*

(1) [1911] 1 Ch. 358. (2) Now reported [1912] W. N. 33.

F. E

SWINFEN EADY J.
1912
Feb. 5, 10.

In re WILLIAMS.
WILLIAMS *v.* WILLIAMS.

[1910 W. 3293.]

Will Condition—Partial Forfeiture—Whole Costs of any Administration Action commenced by a Beneficiary to be paid out of his Share—Action based on Wilful Default — Probabilis causa litigandi — Condition inapplicable or repugnant.

A testator provided that in case any action or other proceedings for the administration of his estate should be commenced by any beneficiary as plaintiff, the costs of all parties should be retained and paid out of the plaintiff's share :—

Held—(*a*) This provision did not apply to an action based on wilful default, this being probabilis causa litigandi.

Powell v. *Morgan* (1688) 2 Vern. 90, and *Adams* v. *Adams* [1892] 1 Ch. 369, 377, applied.

(*b*) The provision if applicable to such an action would have been void for repugnancy.

Rhodes v. *Muswell Hill Land Co.* (1861) 29 Beav. 560, 563, applied.

ACTION.

This was an action by some of the children, grandchildren, or reputed grandchildren of James Williams, as beneficiaries under his will, against John Williams and William Williams, the surviving executors and trustees, and Henry Wallington, the legal personal representative of a deceased executor and trustee, for administration with accounts and inquiries on the footing of wilful default.

By his will, dated June 17, 1886, the testator devised and bequeathed his real and personal estate to his executors and trustees, John Williams, William Williams, and William Henry Wallington, upon trust for sale and conversion with the usual power of postponement.

The testator made various provisions in favour of his children, grandchildren, or reputed grandchildren under which some of the plaintiffs were entitled to life annuities and others had long since become entitled to sums of capital.

By clause 13 of the will the testator provided as follows: "I declare that in case any action or other proceedings for the

SWINFEN EADY J.
1912
WILLIAMS, *In re.* WILLIAMS *v.* WILLIAMS.

administration of my estate shall be commenced in the High Court of Justice in the name of any son or daughter or grandchild or reputed grandchild of mine of full age as plaintiff or plaintiffs then my trustees shall thenceforth stand possessed of all moneys to which such plaintiff or plaintiffs would otherwise have been entitled under this my will in trust to pay thereout in the first place the costs as between solicitor and client of all parties to and having liberty to attend such action or proceedings and that this present trust shall have priority over all trusts herein declared in favour of such plaintiff."

The testator died on July 9, 1886. The executor William Henry Wallington died on February 18, 1903. The defendant Henry Wallington was his legal personal representative.

On December 14, 1910, the estate being still unrealized, the plaintiffs brought this action, alleging (inter alia) that the trustees had been guilty of wilful default in delaying the realization of the estate, and that, though they had received large sums of capital and income for which they had not accounted, the capital sums long since due to some of the plaintiffs were still unpaid, and the annuities and the interest on those capital sums were in arrear.

The plaintiffs claimed as against John Williams, William Williams, and the estate of William Henry Wallington administration with accounts and inquiries on the footing of wilful default and damages including recoupment to the plaintiffs of all costs if any which could be properly thrown by reason of clause 13 of the will on the plaintiffs' shares thereunder.

The defendant Henry Wallington, who did not admit assets, was only sued in his representative capacity, and no personal relief other than costs was asked against him. He put in no defence. The estate of William Henry Wallington was in fact being administered in another action.

Shortly after the case was opened the defendants John Williams and William Williams (hereinafter called the defendant trustees) submitted to judgment for administration with accounts and inquiries on the footing of wilful default, leaving all specific questions to be dealt with on the further consideration, when the facts were fully ascertained. As against Henry Wallington, sued in his

representative capacity, the same judgment went in default of defence.

The question of costs then arose.

Micklem, K.C., and *Tomlin*, for the plaintiffs. The defendants must pay the costs up to and including the hearing.

[SWINFEN EADY J. The defendant Henry Wallington is only sued in a representative capacity. No personal relief other than costs is asked against him, and he has put in no defence. In these circumstances I should not make a personal order for costs against him.]

In that case we only ask for an order against the defendant trustees.

Hon. Frank Russell, K.C., and *S. R. Earle*, for John Williams. Such an order is precluded by clause 13 of the will, which throws the costs of any administration proceedings on the plaintiffs' shares.

[SWINFEN EADY J. It is a strange contention to say that the plaintiffs must bear the costs of proceedings rendered necessary by the trustees' misconduct.]

Clause 13 is equally strange, but it is absolutely clear and unambiguous. These costs, if damages occasioned by the trustees' misconduct, are not damages to the estate. It is essential to distinguish damage to the estate occasioned by the breaches of trust, and the loss to the individual plaintiffs arising from the fact that the testator in disposing of his own property has charged the costs of administration proceedings on their shares. This loss is not damage arising from the breaches of trust at all. It is merely a sum contingently charged by the will on the plaintiffs' shares. In other words, in the event of administration proceedings there is a gift over of part of the plaintiffs' shares for payment of costs.

Arthur Sims, for William Williams, adopted the same arguments.

L. F. Potts, for Henry Wallington.

Micklem, K.C., in reply. In the first place clause 13 only applies to proceedings of an unreasonable nature. It does not apply where there is probabilis causa litigandi : *Powell* v. *Morgan* (1);

(1) 2 Vern. 90.

SWINFEN EADY J.

1912

WILLIAMS, *In re.* WILLIAMS *v.* WILLIAMS.

Adams v. *Adams*. (1) Secondly, the defendant trustees' construction makes clause 13 repugnant to the rest of the will: *Rhodes* v. *Muswell Hill Land Co.* (2) Thirdly, the clause so construed would be void against public policy, as it would prevent the Court doing justice between the parties. Fourthly, if the clause in fact throws the costs of litigation on the plaintiffs' shares, the damage thereby occasioned flows directly from the trustees' misconduct, and can be recovered accordingly.

Hon. Frank Russell, K.C., in reply on the cases cited. In *Powell* v. *Morgan* (3) there was no gift over in the event of the legatee disputing the will, so that the condition was merely in terrorem. In *Rhodes* v. *Muswell Hill Land Co.* (2) the share of a devisee was forfeited to residue if he took any proceedings against anybody in relation to it. This was obviously absurd and repugnant. In the present case the clause is limited to administration proceedings, and only so much of the plaintiffs' shares is given over as is necessary to pay the costs of those proceedings. There is no repugnancy in such a provision.

SWINFEN EADY J. (after stating the nature of the action and that the defendant trustees had submitted to a judgment for administration with accounts and inquiries on the footing of wilful default and that the same judgment would go in default of defence against Henry Wallington in his representative capacity). The remaining question is what is to be done as to the costs up to and including the hearing. Prima facie it would be a matter of course to order the defendant trustees to pay these costs, making no personal order against the defendant Henry Wallington, who is only sued in a representative capacity and has put in no defence. It is contended, however, that having regard to clause 13 of the will the Court has no jurisdiction to make this order. But in my opinion there is nothing in clause 13 which at this stage of the proceedings precludes the Court from ordering the defendant trustees to pay these costs. Even if the plaintiffs' arguments on clause 13 are unsound the Court has ample jurisdiction to make the order at this stage. Clause 13 provides

(1) [1892] 1 Ch. 369, 377. (2) 29 Beav. 560, 563.
(3) 2 Vern. 90.

that "in case any action or other proceedings for the administration of my estate shall be commenced in the High Court of Justice in the name of any son or daughter or grandchild or reputed grandchild of mine of full age as plaintiff or plaintiffs then my trustees shall thenceforth stand possessed of all moneys to which such plaintiff or plaintiffs would otherwise have been entitled under this my will in trust to pay thereout in the first place the costs as between solicitor and client of all parties to and having liberty to attend such action or proceedings and that this present trust shall have priority over all trusts herein declared in favour of such plaintiff." That clause cannot operate so as to prevent the Court now ordering the defendant trustees to pay the costs up to and including the hearing. At the present moment I do not know how the estate will work out, or whether any money that the defendant trustees may be ordered to pay will be forthcoming. The question whether any moneys to which the plaintiffs would otherwise have been entitled under the will, ought to recoup these costs under clause 13 would only arise on the further consideration when the trusts under which the plaintiffs' shares are held would be considered; so that even if the costs ought ultimately to be charged upon and paid out of the plaintiffs' shares, under clause 13, there is ample jurisdiction at this stage to order the defendant trustees to pay the costs up to and including the hearing.

I do not, however, rest my judgment on that ground alone. I am quite satisfied that clause 13 has no application to a case like the present. In the first place it does not apply to an action for administration on the footing of wilful default, which is the gist of the present action. This point is really covered by *Powell* v. *Morgan* (1) and *Adams* v. *Adams* (2), where it is pointed out that such a clause does not apply where there is probabilis causa litigandi. In this case, where capital moneys have been withheld for years and the trustees have been guilty of wilful default and the cestuis que trust have been driven to take proceedings to enforce their rights, the clause is inapplicable.

Again, the clause if applicable to such an action would be void

(1) 2 Vern. 90. (2) [1892] 1 Ch. 369, 377.

SWINFEN EADY J.

1912

WILLIAMS, *In re.* WILLIAMS *v.* WILLIAMS.

for repugnancy. In *Rhodes* v. *Muswell Hill Land Co.* (1), Romilly M.R. in dealing with a clause of this nature said: "The testator says, I give you the property, but if you resort to any proceedings whatever respecting it, even to secure its enjoyment, I give it to some one else; the thing is absurd." In the present case if the clause applied the testator would in effect say "I give you certain shares of property, but if you resort to any proceedings to secure their enjoyment I give so much of those shares as is necessary to pay the costs of those proceedings to some one else." This would be repugnant to the gift.

For these reasons I am of opinion that there is nothing in clause 13 to prevent the Court from visiting upon the trustees the consequences of their own misconduct, by ordering them to pay personally the costs up to and including the hearing.

Solicitors: *Arthur E. Burton; Wilson & Son; E. H. Tucker; Ford, Lloyd & Co.*

(1) 29 Beav. 560, 563.

G. R. A.

In re LAW CAR AND GENERAL INSURANCE CORPORATION.

NEVILLE J.
1912
Jan. 16, 30.

[00437 of 1910.]

Company—Winding-up—Calls—Set-off.

An agreement between a director of a company and the company, that any moneys which the director may pay under a guarantee of the company's overdraft at the bank shall be treated as payments made in advance of future calls, though such an agreement is within the company's powers and validly made, will not enable the director to set off moneys so paid against a subsequent call made by the liquidator in a compulsory winding-up.

Black & Co.'s Case (1872) L. R. 8 Ch. 254, was not decided under s. 25 of the Companies Act, 1867, and is a binding authority notwithstanding the repeal of that section.

This company was registered on August 4, 1906, and for a time carried on a very prosperous business, but in the summer of 1910 it had got into difficulties and money was urgently needed. H. H. Wells, a large shareholder, and one of the directors of the company, offered to guarantee an overdraft of 5000*l.* at the bank, but he stipulated that any payments which he had to make should, in accordance with the articles of association of the company, at his option, be treated as payments made in advance of calls. On August 30, 1910, H. H. Wells entered into an agreement with the bank that he would repay on demand, and guarantee the repayment of, all moneys advanced to the company to the extent of 5000*l.* for principal, and interest from the date of demand for payment. On the same day the finance committee of the board of directors passed the following resolution:—"That application be made to the London and South Western Bank Limited for an advance of 5000*l.* and that Mr. H. H. Wells be authorised to make all necessary arrangements."

At a meeting of the board of directors held on September 6 this resolution was confirmed, and in connection therewith the board unanimously resolved: "That in consideration of Mr. H. H. Wells having undertaken to become security for such

NEVILLE J. 1912 LAW CAR AND GENERAL INSURANCE CORPORATION, *In re.*

loan, it is agreed that any payments made by him, if any, in respect of such guarantee shall be treated at his option as payments made in advance of any calls which may be hereafter made."

On December 20, 1910, the company was ordered to be wound up compulsorily and a liquidator was appointed. It was then found that the company was hopelessly insolvent. H. H. Wells was the holder of 1500 1*l.* B shares on which 5*s.* only was paid up, and of 8000 1*l.* D shares on which only 1*s.* was paid up.

Soon after the winding-up order the bank called upon H. H. Wells to pay the amount of the overdraft, and on August 9, 1911, he paid them for principal and interest 5223*l.* 3*s.* 2*d.* On August 17 Wells wrote a letter to the liquidator exercising his option to have this sum treated as payment in advance of future calls. On July 25, 1911, an order was made in the winding-up authorizing the liquidator to make, and on August 30, 1911, he made, a call of 15*s.* per share on the B shares and 19*s.* per share on the D shares, payable by instalments, of which the first was payable on October 30, 1911, with a proviso that default in payment of any instalment should render the contributory making such default liable to the payment of the whole call at once. H. H. Wells did not pay the instalment due on October 30, and on November 7 the liquidator took out this summons for an order that H. H. Wells should pay the whole of the call, amounting to 8725*l.* The liquidator's counsel, however, only asked for an order for the amount of the two instalments which had become due.

The only question was whether H. H. Wells was entitled to set off against this call the moneys paid to the bank.

The power for the directors to receive payments in advance of calls which was relied upon as justifying the agreement between them and Wells was contained in article 19 of the articles of association. (1)

(1) "19. The directors may, if they think fit, receive from any member willing to advance the same, all or any part of the moneys due upon the shares held by him beyond the sums actually called for; and upon the money so paid in advance, or so much thereof as from time to

Younger, K.C., and *Maugham*, for the liquidator. The power given to the directors by article 19 is a fiduciary power to be exercised only for the advantage of the company, and it clearly applies only to calls made by the directors, not to calls made in a liquidation. It is against the whole principle of the Companies Acts that a shareholder who is a creditor should get priority for the payment of his own debt by setting it off against calls. *Black & Co.'s Case* (1) is a direct authority that no such set-off can hold good in a winding-up, and it clearly governs this case (see judgment of Lord Selborne L.C.). The agreement is also void because it is in fact a mortgage of future calls and therefore required registration under s. 93 of the Companies (Consolidation) Act, 1908, and it is not registered.

Gore-Browne, K.C., and *Galbraith*, for Wells. This is not a set-off, but an agreement between Wells and the company that valuable services should be rendered by Wells, and that the company should take the value of those services when ascertained in part payment of calls on shares. *Black & Co.'s Case* (1) and many other cases of the same period really rested upon s. 25 of the Act of 1867. That section is now out of the way, and an agreement that shares shall be paid for by services is perfectly good. In *In re Jones, Lloyd & Co.* (2) an agreement between a shareholder and a company to set off future calls against a present liability of the company was held good. It cannot make any difference that the exact amount of the company's liability was unascertained. The liquidator's argument must depend on the theory that the directors cannot in any way deal with calls to be made by a liquidator in the winding-up. That is not so. *In re Pyle Works* (3) is an authority that directors can mortgage calls to be made by a liquidator; we

---

time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, the company may pay interest at such a rate as the member paying such sum in advance and the directors agree upon, or in default of agreement at such rate, not exceeding five per centum per annum, as the directors shall think fit."

Art. 89 gave the directors power to exercise all powers of the company not required to be exercised in general meeting.

(1) L. R. 8 Ch. 254.

(2) (1889) 41 Ch. D. 159.

(3) (1890) 44 Ch. D. 534.

NEVILLE J. 1912 LAW CAR AND GENERAL INSURANCE CORPORATION *In re.*

do not contend that this is a mortgage, but if directors have power to mortgage these calls they can deal with them in other ways.

Younger, K.C., in reply.

Cur. adv. vult.

Jan. 30. NEVILLE J. This is a summons by the liquidator to enforce against Mr. Wells, a shareholder, payment of calls made in the winding-up. The amount claimed is 8725*l.*, but it is admitted that only part of this, some 3000*l.* or 4000*l.*, is at present due.

Mr. Wells, a director of the company, guaranteed to their bankers a sum of 5000*l.* advanced by them to the company upon the terms of a resolution passed at a board meeting held on September 6, 1910. The resolution confirmed a resolution of their finance committee in the following terms—"That application be made to the London and South Western Bank Limited for an advance of 5000*l.* and that Mr. H. H. Wells be authorised to make all necessary arrangements," and added, "and in connection therewith the board unanimously resolved that in consideration of Mr. H. H. Wells having undertaken to become security for such loan it is agreed that any payments made by him, if any, in respect of such guarantee shall be treated at his option as payments made in advance of any calls which may be hereafter made." By article 19 of the company's articles of association the directors had power to receive payments on shares in advance of calls, and by article 89 to exercise all powers of the company not required to be exercised by the company in general meeting. The loan by the bank was guaranteed by Mr. Wells, but no payment was made by him under his guarantee until after the liquidation of the company, when he made a payment of over 5000*l.* to the bank, and gave notice to the liquidator of the exercise of the option conferred by the resolution. Subsequently a call was made, and the point to be decided is whether the liquidator can enforce the call without allowing for the payment to the bank. I will assume for the purposes of my judgment that the contract recorded by the resolution was within the powers of the board. What was the contract? It did not

discharge Mr. Wells from liability in respect of the unpaid balance due on his shares. If nothing were paid by him to the bank under his guarantee, or if he did not exercise his option, the liability upon his shares remained intact. It amounted only to this—that if he made payment to the bank he might treat the payment as made on account of the liability on his shares. The legal position then would be, that the company owed him money, and that at his option he was entitled to treat the debt due to him as satisfaction of the debt due from him to the company. I cannot distinguish this from set-off, and certainly, if I regard the reasoning in *Black & Co.'s Case* (1), I am forced to the conclusion that it applies with equal force to the facts of this case. In my opinion *Black & Co.'s Case* (1) did not turn upon want of registration under s. 25 of the Companies Act of 1867, since repealed. Mellish L.J. says (2): "The effect of the 38th section of the Act of 1862 is clearly to make every person who is at the time of the winding up a shareholder, liable to contribute to the debts of the company, that liability being limited to the amount unpaid upon his shares. If there be an amount which at the time of the winding up is unpaid on his shares, then he is liable to contribute that amount towards payment of the debts of the company." In the case before me at the date of the winding-up undoubtedly there was an amount unpaid upon Mr. Wells' shares, and I think he became liable for calls to that amount.

Solicitors: *Rawle, Johnstone & Co., for Peace & Ellis, Wigan; H. H. Wells & Sons.*

(1) L. R. 8 Ch. 254.

(2) L. R. 8 Ch. 264.

J. R. B.

NEVILLE J. *In re* SPOTTISWOODE, DIXON & HUNTING, LIMITED.

1912

Jan. 30.

[00474 of 1911.]

Company — Practice — Dissolution — Declaring Dissolution void — Person interested—Companies (Consolidation) Act, 1908, *s.* 223.

The S. company went into liquidation for the purpose of reconstruction, and by an agreement dated March 31, 1909, between the S. company and its liquidator and a new company with the same name the new company agreed to take over all the assets and liabilities of the old company and to indemnify the old company against such liabilities. The old company held certain shares in A. S., Limited, upon which there was a liability for uncalled capital, but these shares were not transferred to the new company. Meetings of creditors were held, but no notice was sent to A. S., Limited. The final meeting in the voluntary winding up of the old company was filed in compliance with the Companies (Consolidation) Act, 1908, s. 195, on June 26, 1910. The old company became dissolved, therefore, at the expiration of three months from that date. In March, 1911, A. S., Limited, discovered the facts as to the winding up. In April they made a further call of 1*s.* per share upon the shares originally held by the old company. They made persistent attempts to induce the new company to pay the call or admit their liability, but the new company refused. On December 9, 1911, A. S., Limited, gave notice of this motion under s. 223 of the Companies (Consolidation) Act, 1908, that the dissolution of the old company might be declared to have been void:—

Held, that A. S., Limited, were persons interested within s. 223 of the Act; that they had not been guilty of any such laches as would disentitle them to proceed; and that the dissolution must be declared to have been void.

Spottiswoode, Dixon & Hunting, Limited (hereinafter called the old company), was incorporated in 1898, as an amalgamation of two former companies, one of which had a contract with Anturic Salts, Limited, appointing them sole advertising agents of the last-named company, and had subscribed for 500 1*l.* preference shares in Anturic Salts, Limited, upon which 6*s.* had been paid. The benefit of the advertising contract and the said shares had been transferred to the old company, and they had paid a further call of 2*s.* a share, leaving a liability of 12*s.* a share, in respect of which no calls had been made.

Special resolutions for the voluntary winding up of the old

company for the purposes of reconstruction, and assigning its business to a new company, to be also called Spottiswoode, Dixon & Hunting, Limited (hereinafter called the new company), were passed and confirmed on March 12 and 29, 1909, and a liquidator was appointed. The new company was incorporated on March 29, 1909, and an agreement was made on March 31, 1909, between the old company, its liquidator, and the new company, in accordance with the special resolutions, that the new company should take over all the assets and liabilities of the old company and indemnify the old company against all such liabilities. An assignment was executed in pursuance of the said agreement, but the shares in Anturic Salts, Limited, held by the old company were not transferred to the new company. The liquidator issued notices to creditors and called a creditors' meeting and advertised for creditors in the *London Gazette*, but no notice was sent to Anturic Salts, Limited. The final meeting in the voluntary winding up of the old company was held on June 20, 1910, and notice of such meeting was filed with the Registrar of Joint Stock Companies, pursuant to s. 195 of the Companies (Consolidation) Act, 1908, on June 26, 1910. The old company therefore became dissolved on September 26, 1910.

The new company continued to act as sole advertising agents of Anturic Salts, Limited, under the agreement of April 20, 1906, until the month of March, 1911, at which date the agreement was determined by six months' previous notice given by Anturic Salts, Limited. On April 11, 1911, Anturic Salts, Limited, made a further call of 1*s.* per share on the shares held by the old company, and deducted 25*l.*, the amount of the call, from moneys owing from them to the new company, but that company refused to allow the deduction, and repudiated all liability in respect of the said shares on the ground that no transfer of them had been executed. On December 9, 1911, Anturic Salts, Limited, gave notice of motion for an order declaring the dissolution of the old company to have been void under s. 223 of the Companies (Consolidation) Act, 1908, and that it might be declared that Anturic Salts, Limited, were entitled to prove upon the estate of the old company for the

NEVILLE J. balance called and uncalled remaining due upon the said 500 preference shares.

1912

SPOTTISWOODE, DIXON & HUNTING, LIMITED. *In re.*

The old company and its liquidator and the new company were served with the motion. A good deal of evidence was put in to prove that Anturic Salts, Limited, had notice of all the proceedings in the winding up of the old company, but the judge held upon the evidence that they had no notice until March, 1911, and as they then at once gave notice of and insisted on their rights, they had not been guilty of such laches as would disentitle them to make their motion. (1)

Clauson, K.C., and *J. A. Compston*, for the motion. The only case under this section which is reported is *In re Henderson's Nigel, Ld.* (2), in which the liquidator made the application because he had realized certain assets after the dissolution had become final. It was suggested that the proceeds might have become "bona vacantia," and notice was given to the Attorney-General. He appeared and consented to an order by which, practically, the proceeds of the assets realized after dissolution were distributed under the supervision of the Board of Trade, without resuscitating the company. No such order could be of any use here. Anturic Salts, Limited, are clearly "persons interested" within the section. They want the old company resuscitated because they have a claim against them for the amount unpaid upon these shares. They have no claim against the new company, but, when the liability is enforced, the old company will have a claim against the new company under

(1) The Companies (Consolidation) Act, 1908, s. 223, is as follows:

"(1.) Where a company has been dissolved, the Court may at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the Court to be interested, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.

"(2.) It shall be the duty of the person on whose application the order was made, within seven days after the making of the order, to file with the registrar of companies an office copy of the order, and if that person fails so to do he shall be liable to a fine not exceeding five pounds for every day during which the default continues."

(2) [1911] W. N. 159.

their covenant of indemnity, and Anturic Salts, Limited, can practically force them to proceed against the new company. The new company probably abstained from taking a transfer of these shares in order to evade this liability. Our clients had no notice of the winding up. Their strict right against the old company before any calls were made would have been as owners of a contingent claim to restrain the distribution of the assets among the shareholders until a fund was set apart to meet the contingent liability when ascertained.

Jenkins, K.C., and *Vernon*, for the respondents. The new company are not proper respondents to the motion. They are under no liability.

[*Clauson*, K.C., agreed to strike them out.]

The power given to the Court by this section is wholly discretionary and the conduct of the applicants does not entitle them to have the discretion of the Court exercised in their favour. On their own showing they knew of the dissolution in March, 1911, and they never took any proceedings till December. The words of the section are peculiar, the Court has power to declare the dissolution "to have been void"; that would apparently revive the office of liquidator, and make him liable to make fresh returns to the Board of Trade and incur costs, after he has distributed all the assets. That injustice will have been caused by the applicants' delay and is sufficient reason for the Court's refusing to make the order. It is not clear that the applicants can gain anything by the order. They ask for it in order that the old company may enforce some claim against the new company, but what claim? There was no immediate liability of the old company to the applicants, but only a contingent one, which it is said gave them a right to restrain the distribution of the assets; but the assets have been distributed. It may be that if they had taken prompt proceedings the liquidator could have forced the new company to take over the shares. It does not follow that he could do it now. The delay of the applicants really amounts to acquiescence. In any case their laches have made it inequitable to declare the dissolution void against the liquidator when he may have incurred fresh liabilities.

The applicants were not called on to reply.

NEVILLE J. 1912 SPOTTISWOODE, DIXON & HUNTING, LIMITED, *In re.*

NEVILLE J. The amounts involved in the present case are small, and from that point of view the matter might be treated as of small importance, but the law which underlies it seems to me to be of considerable importance.

The facts shortly are these,—and having happened once they are likely to happen many times in the future—, A company goes into voluntary liquidation for the purposes of reconstruction, and, by a contract between the new company and the old company, the new company agrees to purchase the whole of the assets of the old company, to discharge its liabilities, and to indemnify the old company against them. That of course is a contract of an exceedingly familiar kind. In this case as in most others some of the assets which the new company contracted to take over involved liabilities which the new company undertook to pay, and agreed to indemnify the old company against, and, when the transaction came to be carried out, by arrangement between the liquidator and the new company the liquidator forebore to insist upon the new company taking over some of the assets in respect of which there was a liability, and he thereupon sought to take advantage, and did take advantage, of s. 195, treating the matter as though the affairs of the old company had been fully wound up and making a return which, upon the termination of the statutory time, resulted in the dissolution of the old company, and its freedom from any claim on the part of anybody. The result of course is that the liability of the old company never passed to the new company and disappeared, to the great advantage of the new company (as no doubt it would be to the great advantage of other reconstructed companies), who thus were freed from an obligation which they had undertaken by their contract. If that is allowed by the law, and if the arm of the law is so short that it cannot interfere with such a transaction, then, speaking from this place, I have nothing to say about the action of the new company: they have discovered a way in which a liability can be got rid of by a solvent company without discharging it, and they are entitled to the benefit of their discovery. But s. 223 of the same Act, which provides for the dissolution of the company under the circumstances that I have referred to, gives the Court power upon the application of any

persons interested to declare the dissolution to have been void. Terms may be inserted if necessary, but the order simply declaring the dissolution to have been void would put matters back into the position in which they were when the proceedings were taken by the liquidator which resulted in the statutory dissolution of the company.

Now the question is, ought I under those circumstances to make such an order? It is quite clear I think that the applicants are persons interested. I can understand circumstances under which, although persons who were interested applied, the Court might refuse to give them the protection provided by the section: they might have taken such a course as would render it inequitable on the part of the Court to put in operation the provisions of s. 223. Have they done so in the present case? It is said in the first instance that there was something which amounted to acquiescence in what had been done. I think the evidence does not as a matter of fact come anywhere near that. I think that no notice of the dissolution was ever received by the applicants, but even if notice had been received I think that there could not be acquiescence unless the whole of the facts were known, and I do not think it is suggested that it was known that the liquidator and the new company were going to agree that the assets involving liability should not be taken over in accordance with the terms of the contract, and upon that, of course, largely depended the action of the creditor company, because, supposing the transaction had gone through in its entirety, they probably would have been just as well satisfied with the liability of the new company, and would never have thought of endeavouring to enforce any liability against the old company. Then it is said that if there is not acquiescence, at all events there has been such laches as would disentitle the applicant company to the relief that they have asked. I have considered that point and I have come to the conclusion that it is not so. They discovered the position in March or April of 1911. The official communications between the companies I think put the dates somewhat later, about the middle of April, but as soon as the position was ascertained by the applicant company they made their demand. They said that they were entitled to come upon the new company.

NEVILLE J. 1912 SPOTTISWOODE, DIXON & HUNTING, LIMITED, *In re.*

I think legally they were not right in that. They offered to transfer the shares held by the old company to the new company, and the new company, not unnaturally, disclaimed any desire to take a transfer of the shares. Then they made a call of one shilling a share and they sought to deduct the amount of the call from a debt that they owed to the new company. The new company would not allow that and correspondence continued for a considerable time, and the matter was ultimately put in the hands of the solicitors, and I think about November of the same year proceedings were definitely threatened; they were actually commenced in December.

Under those circumstances I am of opinion that there has been no such laches as to disentitle the applicants to ask the Court to give effect to the provisions of s. 223, and it seems to me it would be a disastrous thing if this proved to be a new way of escaping liabilities. It would happen, I think, again and again, and it would be a long time before creditors of a company undergoing reconstruction would realize that the result of the simple refusal on the part of the purchasing company to take over assets which they had agreed to purchase, because there was a liability attaching to them, would in all probability be followed by a dissolution of the old company, and that the rights of the creditors would never have arisen against the new company, and would have been lost against the old company. It seems to me this is a beneficial section which prevents any such injustice as that resulting from the operation of s. 195. I think, therefore, that I ought to make the order declaring the dissolution to have been void, but I do not think it is a case in which any special directions ought to be given.

After some discussion the judge ordered the liquidator to pay the applicants' costs out of the assets, and made no order as to the liquidator's costs.

Solicitors: *Blundell, Gordon & Co.; J. R. Cardew Smith.*

J. R. B.

ATTORNEY-GENERAL *v.* WATFORD RURAL DISTRICT COUNCIL.

PARKER J.

1911

Nov. 28, 29, 30; *Dec.* 5, 21.

[1911 A. 348.]

Highway—Evidence of Dedication—Highway Act, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 23.

At the trial of an action and information in which a declaration was claimed that the portion of Shire Lane between Swillett Corner and Newlands Corner was a public highway for carts and carriages repairable by the defendant council, it was admitted that Shire Lane commenced towards the south in the main road from Rickmansworth to Uxbridge, its extreme limit northward being at a point where the lane formed a junction with an old road called Greener Street, which was a public highway for all purposes repairable by the inhabitants at large.

Between the two extreme limits of the Rickmansworth to Uxbridge road on the south and Greener Street on the north, running southwards from Greener Street, was Swillett Corner, and between these points Shire Lane was admitted also to be a public road for all purposes similarly repairable. From Swillett Corner running south to Newlands Corner, Shire Lane was admitted by the defendant council only to be a public footpath. From Newlands Corner southwards for a considerable distance, and again between two points still further south, Shire Lane was once more a highway for all purposes, repairable by the inhabitants at large.

Shire Lane varied considerably in width, and was bounded on each side by the banks and ditches of old inclosures, the centre line between the ditches forming until recently the county boundary, and the boundary between adjacent parishes and manors and ecclesiastical districts. Although very narrow in places, the lane was throughout its entire length sufficiently wide to admit of vehicular traffic. It was an open road without cross-gates, and formed a convenient route between Denham on the south and Chenies on the north.

The lane was an old one, one map shewing that it existed physically in 1788. At the beginning of the nineteenth century in one part of the lane a strip of land extending from the old ditch on the east to beyond the centre line of the lane had been enclosed, and the person enclosing it was admitted tenant of the manors on either side of the county boundary. In most parts of Shire Lane there existed cart ruts, pointing to its use for cart traffic till comparatively recent times, but the ruts were consistent with a private user. At one time the lane had been a metalled road, the metalling throughout being of sufficient width to accommodate carts and carriages. In and prior to 1865, and for some years afterwards, the lane was in as good a state of repair, so far as

PARKER J.

1911

ATTORNEY-GENERAL v. WATFORD RURAL COUNCIL.

metalling was concerned, as most of the other roads in the neighbourhood, and there was then no difficulty in driving a cart or carriage throughout its entire length.

There was no direct evidence how or when the portions admitted to be highways were dedicated to the public or became repairable, although they existed physically as roads before the passing of the Highway Act, 1835, and the evidence was consistent with dedication having been made long before 1835; but there was no evidence that these portions of Shire Lane were roads to which s. 23 of the Act of 1835 applied if they were dedicated after the passing of the Act, or whether the formalities required by that section had been complied with, and there was no evidence of the private user of the lane or pointing to its being a mere occupation road or otherwise inconsistent with its having been dedicated to the public for all purposes.

The evidence of actual user of the lane by the public was meagre (owing probably to the facts (*a*) that for many years the lane between the points in question had been so overgrown with underwood as to make its use for carts or carriages difficult if not impossible, and (*b*) that even before this growth the land had been little used because the country through which it passed was then sparsely populated), but the evidence of living witnesses (which went back to 1865) shewed that they had driven through the lane as of right, and had been told by persons since deceased that Shire Lane was a public highway both on foot and with carts and carriages, and also that by general reputation the lane was a highway.

There was also evidence from which it appeared that the surveyors of the local authorities interested and those authorities had, in correspondence and in arrangements as to the repair of Shire Lane, and in or in relation to proceedings before the Local Government Board, shewn no trace of having considered the portion of Shire Lane between Swillett Corner and Newlands Corner—the portion in dispute—as being in any different condition, with regard to liability for repair or otherwise, from any other portion of the lane.

The only evidence against public liability to repair Shire Lane was that its repair had been neglected, and the only evidence of dedication for foot passengers only was that in recent years no cart or carriage traffic had been possible by reason of that neglect:—

Held, (1.) that the evidence, positive and negative, justified a finding that Shire Lane, throughout, was a public highway for carts and carriages, repairable by the defendant council; (2.) that, although the onus of proving that the lane was a highway lay on the plaintiffs, proof of user of such a nature that dedication might be reasonably inferred therefrom was sufficient without proving that during the period of user there was a person capable of dedicating—the onus probandi that there was no such person being on the inhabitants; (3.) that the absence of evidence that the inhabitants had ever repaired the lane, though relevant on the question of whether the lane was or was not a public way, did not rebut the inference based on public user and was not by itself evidence to

displace the inhabitants' liability to repair, though, coupled with evidence that some one else was liable, it might have some weight; (4.) that the plaintiff need not give evidence of the inhabitants' liability, before 1835, to repair; (5.) that s. 23 of the Highway Act, 1835, gave the inhabitants a new method of displacing their liability to repair at common law and did not impose on the Crown a new onus of proof, and, therefore, that it was for the inhabitants to prove that a road was one to which the section applied, and not for the Crown to prove that s. 23 did not apply, although, in case of proof that s. 23 applied, the onus of proving that the formalities required by that section to make the inhabitants liable might be shifted; (6.) that the decision of the Court was without prejudice to the right of the defendant council to raise the point whether the portion of Shire Lane in question was a highway unnecessary for public use within the meaning of s. 24 of the Highways and Locomotives (Amendment) Act, 1878.

THIS was the trial of an action and information by the Attorney-General, on the relation of Edgar Percy Hewitt, W. Beauchamp Marshall, and Laura A. Marshall, against the Watford Rural District Council.

The relators were the trustees of the will of G. J. Robinson, who died in 1907, and as such trustees the owners of freehold lands called the "Roughwood Estate" and "Little Blacketts." The Roughwood estate was situate in the parishes of Chalfont St. Peter and Chalfont St. Giles in the rural district of Amersham in the county of Bucks, and Little Blacketts was situate in the parish of Chorley Wood in the rural district of Watford in the county of Herts.

Little Blacketts and part of the Roughwood estate abutted on a lane called "Shire Lane," connecting the main road from Reading to Hatfield with the main road from Rickmansworth to Uxbridge; and part of the Roughwood estate which abutted on part of that portion of Shire Lane which lay between the turning to the Swillett and the junction between Shire Lane and Rickmansworth and Chalfont St. Giles main road was alleged to be in the occupation of the relators, who alleged that Shire Lane, prior to and at the date of the Highway Act, 1835 (5 & 6 Will. 4, c. 50), was a highway repairable by the parish or respective parishes through which the same passed, and that the same was now repairable by the defendant council as to the portion thereof lying between the turning to the Swillett and the point where

PARKER J. 1911

ATTORNEY-GENERAL v. WATFORD RURAL COUNCIL.

the lane crossed the main road leading from Rickmansworth to Chalfont St. Giles.

The condition and history of Shire Lane are stated with comparative brevity in the head-note above, and more fully in his Lordship's judgment.

The plaintiffs claimed a declaration that the portion of Shire Lane between Swillett Corner and Newlands Corner (1) was a public highway and repairable by the defendant council, and an order on the council to put that portion into a proper state of repair. The council made certain admissions and raised certain defences which are sufficiently stated in the head-note and judgment.

The action was tried by Parker J. on November 28, 29, and 30 and December 5, 1911, when evidence was given which is referred to in his Lordship's judgment.

Macmorran, K.C., and *J. M. Paterson*, for the plaintiffs. Shire Lane is quite an old highway. It may be traced on many old maps, one of which, Jeffery's Map of Buckinghamshire, is dated 1788. The lane varies in width, but although in parts it is narrow, it is throughout its length wide enough for the passage of carts and carriages. There is a continuous road or way, along Shire Lane, from its junction with the main road from Rickmansworth to Uxbridge—the most southerly point—to its junction with Greener Street—the most northerly point. Between Greener Street and Swillett Corner, going south, the lane is admittedly a public highway for all purposes repairable by the public at large. From Swillett Corner to Newlands Corner, going further south, the lane is only admitted to be a public footpath. This is the portion of Shire Lane which is the subject of the action, and which we say is a public highway for all purposes which the defendant council is bound to repair. From Newlands Corner going further south, and again for a distance still further south, the lane is a highway for all purposes repairable by the inhabitants.

The defendants will say that Shire Lane is, in the part they are asked to repair, only a footpath or at most a bridle-way

(1) See head-note above.

or pack-way; but the lane is metalled to a considerable extent, and it is quite unusual to find a bridle-way which is metalled. Bridle-ways generally take no notice of gradients, but this lane has the easiest gradients, and is cut out in places, and in many parts of it there are cart ruts. In a case like this it is difficult if not impossible to produce a great amount of evidence, but evidence can be produced that the lane has been used as a carriage road. There will also be evidence as to how the lane has from time to time been regarded by the various local authorities concerned in its repair. The part now in question has been absolutely neglected, and the pathway is now much obstructed by the growth of underwood. One of the evidences of the road being a highway is that it is between hedges, although we do not say that the road extends all the way in width between the two hedges. That is not the question here. We want a declaration that between Swillett Corner and Newlands Corner there is a highway, and as to what kind of a highway it is and by whom it is repairable. (1) [They referred to the Highway Act, 1835 (5 & 6 Will. 4, c. 50), ss. 23, 58, and the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 15.]

Romer, K.C., and *J. E. Harman*, for the defendant council. In order to succeed the plaintiffs must shew that the part of Shire Lane in question was repairable by the inhabitants at large before March 20, 1835, when s. 23 of the Highway Act, 1835, came into operation, or that it was subsequently dedicated by private owners and that the requirements of that section were complied with. The plaintiffs have not attempted to shew any such subsequent dedication or compliance.

The argument of the plaintiffs is a speculative one—that because, perhaps for 100 years, there has been a track along what they are pleased to call Shire Lane, and parts of it have been dedicated, therefore a certain other part is a highway for all purposes. We only admit that the portion in question has been dedicated as a footpath. It is absurd to suggest that a road was deliberately laid out all the way that the lane or

(1) The evidence is sufficiently stated in the judgment of his Lordship, pp. 426 sqq., post.

PARKER J. 1911

ATTORNEY-GENERAL v. WATFORD RURAL COUNCIL.

track now goes at any particular time, and that the landowners all along the track joined in making one dedication to the public.

One cannot assume that all the Roman roads now existing have been dedicated to the public, and the Court will not draw the inference that, because parts of this ancient track have been dedicated as highways for all purposes, therefore the rest of the track has been similarly dedicated. Because the track is shewn on old maps it cannot be inferred that, as parts were dedicated before 1835, therefore the whole was dedicated.

The plaintiffs' evidence is too slight to be acted on by the Court, and they have given no evidence at all as to dedication. The lane may have been an old occupation road to the two manors. It was open to the plaintiffs to prove dedication by evidence of user or of the fact that repairs had been done by the local authorities all along the lane. If there was any dedication it must have taken place at all events after 1825, when part of the lane was enclosed. Such metalling as there was does not help the plaintiffs. The evidence of using the lane as a carriage-way is only as to what has occurred recently and throws no light on what happened before 1835. The evidence as to what took place between the surveyors and the district councils is of a negative kind which has no direct bearing on the questions involved, and the like may be said of the Local Government Board proceedings.

Evidence as to non-repair is strong evidence of a road not being a highway: *Vernon* v. *St. James's, Westminster*. (1) The mere user of a way during the occupation of tenants only binds the landlord when he was aware of it, although his knowledge may be presumed when the user has been for a great length of time: *Davies* v. *Stephens*. (2) The Court is asked to infer that a dedication took place before 1835. The onus is on the plaintiffs to shew facts establishing the liability to repair. It has never been laid down as a general proposition that every highway is repairable by the parish. If there was no repair, there was probably little or no user. It cannot be argued that, because during the period of user it is not shewn that there was any

(1) (1880) 16 Ch. D. 449. (2) (1836) 7 C. & P. 570.

person capable of dedicating, therefore a proper dedication cannot be presumed: *Turner* v. *Walsh* (1); *Reg.* v. *Petrie*. (2) The plaintiffs have failed to discharge the onus which is on them. [They also referred to *Winterbottom* v. *Lord Derby* (3); *Attorney-General* v. *Antrobus*. (4)]

Macmorran, K.C., in reply. I agree that at the outset the onus is on the plaintiffs to shew some evidence that the road is a highway repairable by the defendants. The first question is, is Shire Lane a highway? There is no doubt at all as to this. It is shewn on many old maps, and importance is rightly attached to what is found in them: *Trafford* v. *St. Faith's Rural Council*. (5) It is not denied that in parts the lane has been repaired, even as a carriage-way, by the local authorities. Unless the lane had been a highway it would not have been lawful to spend parish moneys on it. The fact that repairs have only been made in parts only shews that the local authorities did not want to spend more money than they could help, and therefore repaired the parts which were more used than others were. There is no evidence that the portion in question was a mere footpath. A footpath is not expected to be metalled, as this road is, for more than the breadth of one cart. In such a case as this one can get little evidence. The district is sparsely populated, there are no accounts of repairs, and there are no ancient inhabitants.

If the only repairs shewn were made after 1835, that would not be enough, but there is here enough evidence of earlier repairs. Sect. 23 of the Highway Act, 1835, only applied to some highways and did not make such differences as it was commonly supposed to have done: see *Reg.* v. *Thomas*. (6) It does not follow that because land is in settlement it cannot be dedicated as a highway during the existence of the estate of a limited owner: *Farquhar* v. *Newbury Rural Council*. (7) The plaintiffs are not seeking to make the defendant council liable to make extensive repairs at once. They are now only

(1) (1881) 6 App. Cas. 636.
(2) (1855) 4 E. & B. 737.
(3) (1867) L. R. 2 Ex. 316.
(4) [1905] 2 Ch. 188.
(5) (1910) 74 J. P. 297.
(6) (1857) 7 E. & B. 399.
(7) [1908] 2 Ch. 586.

PARKER J. 1911 — ATTORNEY-GENERAL v. WATFORD RURAL COUNCIL —

asking for a declaration as to the liability to repair. To put the road in thorough repair throughout would cost about 2000*l.*, but that will not be thrown on the council at once. The time will come when the district will be more populated, and considerably greater repairs than at present will be required, but there will then be a larger number of persons to bear the expense in the shape of rates. The right of the public, however, is to have the whole width of the road preserved free from obstructions: *Turner* v. *Ringwood Highway Board.* (1) [They also referred to *Paris* v. *Lymington Rural Council* (2); Pratt and Mackenzie on Highways, 16th ed. pp. 10, 12, 92.]

Cur. adv. vult.

Dec. 21. PARKER J. The plaintiffs in this case ask for a declaration that a certain portion of the lane known as Shire Lane, in the pleadings more particularly referred to, is a public highway repairable by the defendant council. This lane is undoubtedly an old lane. It existed as long ago as 1788, as appears from Jeffery's map of Buckinghamshire preserved in the British Museum. It commences towards the south in the main road from Rickmansworth to Uxbridge and runs northwards to a place known as Currents Bottom; there it forms a junction with an old road called Greener Street, leading from Currents Bottom into the main road from Reading to Hatfield. Throughout the whole length Shire Lane follows the boundary between the counties of Buckingham and Hertford, probably deriving its name from this fact. It varies considerably in width, and is bounded on either side by the banks and ditches of old inclosures, the centre line between those ditches forming till recently not only the county boundary but the boundary between adjacent parishes and manors and apparently also between adjacent ecclesiastical districts. At the beginning of last century, in one part of the lane, a strip of land extending from the old ditch on the east to beyond the centre line of the lane seems to have been enclosed, and the person who made this inclosure was admitted tenant of the manors on either side of the county boundary. The lane, though very narrow in places, is throughout its

(1) (1870) L. R. 9 Eq. 418. (2) (1911) 75 J. P. (Journ.) 88.

whole length sufficiently wide to admit of vehicular traffic, and in most places there exist cart ruts, pointing to its use for such traffic till comparatively recent times. Further, it seems reasonably certain that it was at one time a metalled road, the metalling throughout being of sufficient width to accommodate carts and carriages. In and prior to the year 1865, and for some years after, it was in as good a state of repair so far as metalling is concerned as most of the roads in the neighbourhood, and there was then no difficulty in driving a cart or carriage throughout the whole length. It was an open road without cross-gates, and formed a convenient route between Denham on the south and Chenies on the north. It is admitted that Greener Street is a public highway for all purposes repairable by the inhabitants at large. It is admitted that Shire Lane from Greener Street southwards to its junction with the road which leads eastwards to the Swillett (a point which I will call Swillett Corner) is a public road for all purposes similarly repairable. The portion of the lane beween Swillett Corner and its junction with the road from Chalfont St. Giles to Rickmansworth (a point which I will call Newlands Corner) is the portion in question in this action. As to this the only admission is that it is a public footpath. It is, however, admitted that from Newlands Corner southwards for some considerable distance, and again between its junction with a road leading west to Chalfont St. Peter and its junction with the road leading east known as Chalfont Lane, the Shire Lane is once more a highway for all purposes repairable by the inhabitants at large. There is no direct evidence how or when the various roads or portions of roads to which I have referred, and which are admitted to be highways, were dedicated to the public or became repairable by the inhabitants at large. They certainly existed physically as roads before the passing of the Highway Act, 1835, and the evidence is consistent with, if it does not actually point to, their having been so dedicated long before 1835, in which case they would at common law be repairable by the inhabitants at large. On the other hand, if they were so dedicated after the passing of the Highway Act, 1835, the question of the liability of the inhabitants at large for their repair would depend first upon whether

PARKER J. 1911 ATTORNEY-GENERAL v. WATFORD RURAL COUNCIL.

they were roads to which the provisions of the 23rd section of that Act applied, and, if so, secondly, upon whether the formalities required by that section had been complied with. There is no evidence on either point.

The first question I have to determine is whether Shire Lane from Swillett Corner to Newlands Corner is a public highway for all purposes or whether it is a public footpath only. That it has at some time been used for carts and carriages is apparent from the ruts, but those ruts are consistent with a private user. On a question of this sort evidence of actual user by the public would be of the utmost importance. Unfortunately, in the present case the evidence of actual user is somewhat meagre. This may be due to the fact that for many years past the lane between the points in question has been so overgrown with underwood as to make its use for carts and carriages difficult, if not actually impossible, and also to the fact that even before the growth of this underwood the lane was little used, because the country through which it passes was then sparsely populated. There are, however, three witnesses to its user by the public and some considerable evidence of its reputation as a public carriage-way, and there is no evidence of its private user, nor any evidence pointing to its being a mere occupation road or otherwise inconsistent with its having been dedicated to the public for all purposes. Of the three witnesses I have mentioned the first was Dr. Henderson, who from 1865 to 1893 was in practice at Rickmansworth, and frequently drove his four-wheeled phaeton along the lane, sometimes on his way from Denham to Chenies passing throughout its whole length, sometimes entering it at Newlands Corner and passing along it from Newlands Corner to Currents Bottom, where it enters Greener Street. He did this as of right because he thought, and it was generally reputed in the neighbourhood, that the lane was a public highway. He sometimes met droves of sheep in the lane between Swillett Corner and Newlands Corner. He often met Dr. Codd, a fellow practitioner, driving along this part of the lane, and once he met Mr. Fellows, a solicitor, and at one time a member of the Watford Highway Board, driving in this part. Both Dr. Codd and Mr. Fellows are dead, but

each of them made statements to Dr. Henderson to the effect that the lane was a public highway both on foot and with carts and carriages. Secondly, Mr. Edward Stanley Roscoe, the owner and occupier for the last twenty-five years of the Horn Hill Court property abutting on the lane south of Newlands Corner, used the lane in driving from his property to Chorley Wood, entering it from Horn Hill Court and driving north past Newlands Corner. When, however, he reached the point where the lane turns sharp to the left, he used to enter the fields on the right, and so up by Bullsland Farm, and so to Swillett Corner, thus avoiding a hill and a piece of bad road. I am satisfied that he used this portion of the lane as of right and because it was a reputed public highway, but that he turned up by Bullsland Farm not as of right, but because he thought no one would object. When riding, however, he sometimes followed the lane right through from Newlands Corner to Swillett Corner. This witness also speaks to the general reputation of the road as a highway. Thirdly, there is the evidence of Mr. Edward Gawne Roscoe, a son of Mr. Edward Stanley Roscoe, which is to the same effect as his father's evidence. These three witnesses exhaust the evidence as to actual user.

I will now pass to more recent events, which appear to me to have considerable importance in relation not only to the question whether from Swillett Corner to Newlands Corner the lane is a way for all purposes, but to the question whether the defendant council is liable for the repair. In 1895 Mr. Albert Freeman was appointed assistant surveyor to the Board of Surveyors of the old parish of Rickmansworth. The boundary of this parish was coincident with the county boundary, that is to say, the centre line of Shire Lane from Currents Bottom southwards as far at any rate as the junction of Shire Lane with Chalfont Lane. The result was that Shire Lane was divided longitudinally, the eastern or Hertfordshire half falling within the district of the Board of Surveyors for Rickmansworth, and the western or Buckinghamshire half within the district of the Amersham Rural District Council. As a matter of fact, however, Mr. Freeman found that from Currents Bottom to Swillett Corner the whole lane was being repaired by the Rickmansworth Board. Under

PARKER J. 1911 ATTORNEY-GENERAL v. WATFORD RURAL COUNCIL.

those circumstances he entered into correspondence with Mr. Macpherson, the surveyor to the Amersham Rural District Council. On August 1, 1895, those two gentlemen met and walked along Shire Lane from Currents Bottom, past Swillett Corner and Newlands Corner and Horn Hill Court, in order to agree as to the portions which should be kept in repair by the two road authorities, and to distribute the burden fairly between them. They appear to have agreed that the only portions of the lane which need be repaired were from Currents Bottom to Swillett Corner, about five furlongs, and from Newlands Corner southward for a mile and two chains, and that the repair of the former portion should be undertaken by the Rickmansworth Board and the repair of the latter portion by the Amersham Rural District Council, an arrangement subsequently ratified by the two road authorities. It appears that the chief traffic was on the former portion, which accounts for its being considered as equivalent to the latter portion notwithstanding the actual distances. I am satisfied that this arrangement was come to on the footing that Shire Lane was a highway repairable throughout by the inhabitants at large, but that from Swillett Corner to Newlands Corner the traffic was not such as to require repair by the road authorities. There is no trace of either of the surveyors or either of the road authorities having considered this portion as different from any other portion of the lane in respect either of liability to repair or of the extent to which the public had a right of user, and on October 10, 1895, we find Mr. Freeman writing to Mr. Macpherson to give the proper notices to the adjoining owners to cut the overhanging trees on the Buckinghamshire side on that part of the lane where it had been decided that no repair was necessary.

It appears that in 1898 the old parish of Rickmansworth was divided into three parishes, Rickmansworth urban, Rickmansworth rural, and Chorley Wood, and after some sort of interregnum the defendant council succeeded to the rights and liabilities of the old Rickmansworth Board of Surveyors, so far at any rate as relates to those portions of Shire Lane with which we are immediately concerned. The defendant council thereupon agreed with the Amersham Rural District Council

that the latter council should for an annual payment undertake the repair of Shire Lane so far as it lay within the defendant council's district. Again, I can find no trace in the correspondence of the lane between Swillett Corner and Newlands Corner being considered as in any different position with regard to liability for repair or otherwise from any other portion of the lane. The Amersham Rural District Council did not fulfil their part of the bargain, and this gave rise to complaints on the part of the public, though those complaints did not apparently relate to the portion of the lane between Swillett Corner and Newlands Corner. The defendant council called on the Amersham Rural District Council to fulfil its obligations, and the latter council asked for particulars, pointing out that the lane was several miles in length and for the most part a country by-road very little used, and which could not possibly be maintained in first-class condition. The Amersham Rural District Council appear to have carried out certain repairs under threat of a Local Government Board inquiry, but there is no trace of either district council having distinguished one part of Shire Lane from another part, except on the ground that the public user was more extensive in one part than in another. The correspondence seems to me to proceed on the footing of a public liability for the repair of the lane throughout its whole length. The Amersham Rural District Council determined the arrangement by which they undertook the repair of the lane as on September 29, 1901, and a new arrangement was then entered into whereby the defendant council undertook the repair of the whole lane from Currents Bottom to Swillett Corner and the Amersham Rural District Council undertook the repair of the whole lane in the two other portions where it was then available for traffic—that is to say, the two portions now admitted to be highways for all purposes repairable by the inhabitants at large as above mentioned. There was no arrangement as to the portion between Swillett Corner and Newlands Corner, apparently on the ground that this portion was not then available for traffic, and not that it differed in other respects from the rest of the lane. Again, the correspondence appears to me to proceed on the footing that there was a public liability for the repair of

PARKER J. 1911 ATTORNEY-GENERAL v. WATFORD RURAL COUNCIL.

the whole lane. On October 13, 1902, the defendant council applied to the Hertfordshire County Council with a view to the lane from Currents Bottom to Swillett Corner being declared to be a main road. The difficulty was that this section of the road was in two counties, and the defendant council suggested an agreement between the two county councils for a readjustment of the boundary. The two councils accordingly entered into negotiations with this result: that in November, 1905, they made a joint representation to the Local Government Board. Meanwhile, on December 12, 1905, the defendant council received a complaint from Mr. Guy, on behalf of the Chorley Wood Parish Council, of the condition of Shire Lane near Phillips Wood between Swillett Corner and Newlands Corner, with a request to cut the hedges and put the lane in order. It does not appear that the defendant council answered this communication, but they must have gathered from it that this section of the lane was in fact claimed as a public highway. This is not without importance in considering their action, or rather their inaction, in reference to the joint representation of the county councils and the Local Government Board inquiry held in consequence thereof. The representation commences with a recital that the boundary of the counties of Buckingham and Hertford runs along the centre of various highways as shewn by the black dotted line on nine annexed maps. Four of these maps relate to portions of and together include, as I gather, the whole of Shire Lane, and no distinction is drawn between the various portions shewn on the respective maps as to liability to repair or the nature of the highway or otherwise. There are other recitals from which it appears (1.) that the two county councils were desirous of declaring certain of the said highways to be main roads by virtue of powers vested in them by the Highways and Locomotives (Amendment) Act, 1878; (2.) that the councils also thought it was desirable that an order should be made under the 58th section of the Highway Act, 1835, so as to avoid the inconvenience therein referred to as arising by reason of one parish being responsible for the repair of half the highway in question and the other parish responsible for the repair of the other half; and (3.) that difficulties had

arisen by reason of the highways in question being in two counties as well as in two parishes. The councils therefore pray for an adjustment of the boundaries between both the counties and the parishes in which all the highways referred to are situate. Nowhere in the representation is any distinction drawn between the different portions of Shire Lane as to liability to repair, or the extent of the right of public user or otherwise, and the inconvenience referred to in s. 58 of the Highway Act, 1835, is an inconvenience depending on the public liability to repair. The Local Government Board required a copy of the representation to be served on the district council, and asked for their remarks thereon. It does not appear that the defendant council made any remarks on the representation pointing to any such distinction, nor does it appear that anything pointing to any such distinction transpired at the local inquiry which followed in due course. Thereafter the Local Government Board made an order in accordance with the representation, and that order was confirmed by the Local Government Board Provisional Orders Confirmation (No. 8) Act, 1906. Thereby the entirety of Shire Lane from Currents Bottom to Newlands Corner became part of the county of Hertford, and the entirety of Shire Lane from Newlands Corner southwards became part of the county of Buckingham, and the parish boundaries were at the same time altered and adjusted so that the entirety of Shire Lane from Currents Bottom to Newlands Corner fell within the district of the defendant council. Nowhere is there any suggestion of the distinction to which I have before referred. I think it reasonably certain that all the correspondence and transactions to which I have referred took place and were carried through on the footing that Shire Lane was throughout a public road for all purposes and repairable by the inhabitants at large. The first suggestion that the part of the lane in question is not repairable by the inhabitants at large occurs subsequently in the correspondence which led up to the institution of this action. The first suggestion that such part is not a highway at all does not come till the proceedings before the magistrates shortly before this action was instituted. The first suggestion that such part was a highway for foot passengers and not for carts or carriages

PARKER J. 1911 ATTORNEY-GENERAL v. WATFORD RURAL COUNCIL.

does not come till after action brought. I am not overlooking the fact that in the summer of 1904 the defendant council erected at Swillett Corner a sign-post intimating that the lane from this corner southwards was a footpath only, but this was evidently done merely because the lane had at this part become impassable or almost impassable for carts and carriages, and not by way of intimating that there was no right of carriage-way at all.

Having now stated the effect of the evidence before me, I have to ask myself what is the right conclusion to draw. In my opinion, the only hypothesis consistent with all the facts is that the lane known as Shire Lane is an old lane dedicated to the public for all purposes prior to the Act of 1835, and used as a public thoroughfare both on foot and with horses and carriages up to about the year 1890, the user in parts becoming less and less and gradually ceasing altogether, except perhaps as to foot traffic. The liability of the inhabitants at large for the repair of the road extends only to keeping it in reasonable repair for the convenience of persons desiring to use it. The justification put forward for the non-repair of part of the lane appears to have consisted in the fact that such parts were little used, and not in the fact that such parts were not repairable by the inhabitants at large or that such parts were not a public highway for all purposes. The only evidence of there being no public liability to repair consists in the repair having been neglected, and the only evidence of dedication for foot passengers consists of this, that in recent years no cart or carriage traffic has been possible by reason of such neglect. On the other hand, the evidence points to the lane, which existed in 1788, having in or before and for some time after the year 1865 been a continuous public thoroughfare both on foot and with carriages, and there is nothing now remotely suggesting that any part of it was a road dedicated since the Act of 1835 to which the provisions of s. 23 of that Act would apply, or that as to any part of it the formalities required by that section were observed.

The evidence of reputation, and the fact that everybody has till the correspondence which led up to this action, acted on the footing that the road was a public road repairable by the inhabitants, points to the same conclusion.

I find, therefore, on the facts, in the plaintiffs' favour, and I am confirmed in this conclusion to which I have arrived by considerations affecting the onus probandi in highway cases. Upon the trial of an indictment of the inhabitants of a parish for non-repair of a highway, it was of course necessary for the Crown to prove that the way in question was situate within the parish, and was a public highway. Proof of user of such a nature that dedication might be reasonably inferred therefrom was sufficient, without proving that during the period of user there was a person capable of dedicating this way. It was for the inhabitants to prove that there was no such person, if they relied on this fact. Again, the mere fact that there was no evidence that the inhabitants had ever repaired the way, though relevant on the question whether the way was a public way or not, did not rebut the inference based on public user. Similarly the Crown, at any rate before the Highway Act, 1835, need give no evidence of the liability of the inhabitants to repair. This was presumed at common law in the case of all public roads, though it could be displaced by proof on the part of the inhabitants that the liability rested on some one else ratione tenuræ or otherwise. The fact that the inhabitants had never repaired the road was by itself no evidence to displace their liability to repair, though, coupled with evidence that some one else was liable, it might have some weight. It seems to me that the proper mode of regarding s. 23 of the Highway Act, 1835, is to regard it as having opened to the inhabitants a new method of displacing their liability at common law, and not as having imposed on the Crown a new onus of proof. If this be so, it is for the inhabitants to prove that the road in question is a road to which the section applies, and not for the Crown to prove that the section has no application, though it is possible that if the inhabitants once prove that the way in question is a way to which s. 23 applies, the onus of proving that the formalities required to make the inhabitants liable have been observed may be shifted to the Crown. The importance of this consideration is likely to increase with the increase of the time which has elapsed since the passing of the Act of 1835, and though my findings of fact would, in the present case, be the same, even if I am wrong in what I have

PARKER J. 1911 ATTORNEY-GENERAL v. WATFORD RURAL COUNCIL.

said as to the onus probandi, it is not unsatisfactory, in a case which has caused me some anxiety, that these findings are such as they would have been if I had to rely on the onus of proof in coming to a conclusion.

I ought perhaps to add that, in coming to my decision, I have not in any way been influenced by the question whether the portion of Shire Lane in question is or is not a highway unnecessary for public use within the provisions of the Highway Acts. Notwithstanding my decision, therefore, it will be still open to the defendant council, if so advised, to raise this question elsewhere.

I propose to declare that Shire Lane from Swillett Corner to Newlands Corner is a public highway for all purposes repairable by the inhabitants at large, and to reserve to any party liberty to apply. The defendant council must pay the plaintiffs' costs of action.

Solicitors for plaintiffs: *Stow, Preston & Lyttelton, for H. Lomas, Rickmansworth.*

Solicitor for defendant council: *E. W. Reeves, for Sedgwick, Turner, Sworder & Wilson, Watford.*

F. E.

EVE J.
1912
Jan. 23.

In re HALSTON.
EWEN *v.* HALSTON.

[1911 H. 1775.]

Will—Construction—Name—Misdescription — Gift to Non-existing Person — Latent Ambiguity—Evidence—Admissibility — Summons by Trustees — Costs—Unsuccessful Litigant—Practice.

By his will made in 1891 a testator devised all his freehold property to his wife for life, and after her death "unto and to the use of John William Halston (otherwise Alston), the son of Israel Halston (otherwise Alston)" in fee simple. The testator died in 1899, and his widow, the tenant for life, in 1911. Israel Alston, the testator's brother, had a son called John William Alston, who was born in March, 1874, and whose existence was known to the testator, but who died ten days afterwards, seventeen years before the date of the will. This son's death was well known to the testator. Israel Alston had other sons, of whom one, the defendant John Robert Halston (otherwise Alston), claimed the property. There was evidence that the son who died had received his names at the request of the testator, and that the testator desired that J. R. Halston should bear the name of John. Further, that the testator had told J. R. Halston that the land would be his some day. There was no evidence that the testator knew that the boy had been given the name of John Robert. Upon a summons by the legal personal representatives of the testator to decide who was entitled, the defendant John Robert Halston and the three co-heiresses-at-law of the testator were made respondents, but only one of the co-heiresses asserted a claim and appeared to support it:—

Held, that the testator must have contemplated some person who was alive at the date of his will to be the object of his bounty; and on the extrinsic evidence, which was admissible, the testator intended to devise the property to John Robert Halston.

In re Ely (1891) 65 L. T. 452, not followed.

In re Ofner [1909] 1 Ch. 60, 63, followed.

Held, further, that the costs of the successful respondent must be paid by the unsuccessful respondent according to *In re Buckton* [1907] 2 Ch. 406, 415.

Adjourned Summons.

By his will, dated September 28, 1891, the testator, John William Halston, appointed his wife, Eleanor Rebecca Halston, to be sole executrix of his will, and devised all the freehold property of or to which he should be seised, possessed, or entitled at the time of his decease unto and to the use of his said wife and her assigns during her life for her sole and separate use, "and after her decease unto and to the use of John William Halston

EVE J.
1912
HALSTON, *In re.* EWEN *v.* HALSTON.

(otherwise Alston) the son of Israel Halston (otherwise Alston), of Corringham, in the county of Essex, in fee simple." The testator died on November 18, 1899, and the will was duly proved by his widow and sole executrix. The widow went into possession of the rents and property of the real estate devised to her for life, and so continued down to the date of her death on January 7, 1911. By her will, dated December 31, 1910, Eleanor Rebecca Halston appointed the plaintiffs, James Ewen and John Brand, to be her executors. Israel Alston, named in the will of the testator, had four sons, namely, (1.) John William Alston, who was born on March 5, 1874, and died ten days after on March 15, 1874, (2.) James Malet Alston, (3.) John Robert Halston (otherwise Alston), the defendant, who was born on October 9, 1878, and (4.) Horace Edward Alston. The second and fourth sons made no claim. There was evidence that it was by the testator's request that the first child of Israel Alston, namely, John William Alston, was so named, and the testator was fully aware of his death. On the birth of John Robert Alston, the testator desired that he should be called by the name of John, but his parents christened him John Robert; further, that the testator told John Robert Halston, when out shooting, that the land would be his some day.

The defendant John Robert Halston (otherwise Alston) claimed the whole of the property on the ground that he was the person referred to in the will as John William Halston. The defendants Charlotte Jane Went, Kate Smith, and Thirza Maria Adlington were the co-heiresses-at-law of the testator. Only the first named of them appeared at the trial and filed no evidence. The plaintiffs, as legal personal representatives of the testator, issued a summons to determine whether, upon the true construction of the will, the defendant John Robert Halston (otherwise Alston) became entitled, on the death of the tenant for life, to the freehold property in question under the devise in the said will to John William Halston (otherwise Alston), or whether the said freehold property, upon the death of the tenant for life, descended as on an intestacy.

Maugham, for the legal personal representatives.

P. O. Lawrence, K.C., and *P. S. Stokes*, for the defendant John

Robert Halston. We submit that the decision of Kekewich J. in *In re Ely* (1) is wrong. The Court will admit evidence to shew that the person named in the will is misdescribed, although there had existed a person known to the testator who accurately fulfilled the description, but who was dead at the date of the will: Theobald on Wills, 7th ed. p. 265. In the case of *In re Ofner* (2) Farwell L.J. considered that *In re Ely* (1) was wrongly decided. The cases prior to that decision, which were not cited to Kekewich J., clearly shew that when the person actually described in the will has died before the date of the will, and that fact was known to the testator, extrinsic evidence is admissible to shew who the testator intended by his description: *Parsons* v. *Parsons* (3); *In re Blackman* (4); *Dooley* v. *Mahon* (5); *Stringer* v. *Gardiner* (6); *Coldwell* v. *Holme.* (7)

On the question of costs, the successful litigant is entitled to get them from the unsuccessful respondent: *In re Peel.* (8)

Lightwood, for the heiress-at-law. On the question of construction, until *In re Ely* (1) is overruled it is binding on this Court and it is on all fours with the present case. In order to admit extrinsic evidence there must be ambiguity arising on the will itself. Here there is none. The testator, as in *In re Ely* (1), accurately described a person whom he had known, and evidence cannot be admitted to shew that he intended another.

With regard to the costs, this is a summons by executors upon the construction of a will, and the costs should come out of the estate. Having regard to the decision in *In re Ely* (1) the construction of this gift was doubtful, the claim of the heiress-at-law was bona fide, and the executors were justified in coming to the Court. In *In re Buckton* (9) and *In re Clarke* (10) the settled practice of the Court in respect of costs is stated.

P. O. Lawrence, K.C., in reply.

EVE J. [after stating the terms of the devise, continued:] In the devise the testator has accurately described a person whose

(1) 65 L. T. 452.
(2) [1909] 1 Ch. 60, 63.
(3) (1791) 1 Ves. Jun. 266.
(4) (1852) 16 Beav. 377.
(5) (1877) I. R. 11 Eq. 299.
(6) (1859) 4 De G. & J. 468.
(7) (1854) 2 Sm. & Giff. 31.
(8) (1899) 81 L. T. 504.
(9) [1907] 2 Ch. 406.
(10) (1907) 97 L. T. 707.

EVE J.
1912
HALSTON, *In re.*
EWEN *v.* HALSTON.

existence had been known to him, and whose death, some seventeen years before the date of the will, had also been known to him. In these respects the facts are identical with those in the case of *In re Ely* (1), where Kekewich J. held that, there having been a person in existence known to the testator answering to the exact description of the legatee, there was no such ambiguity on the face of the will as to admit of parol evidence being given for the purpose of identifying the person whom the testator meant to take the benefit of the legacy, and he held that in those circumstances the gift could not take effect. If that decision stood alone, it would be my duty, in accordance with well-established practice, to follow it. But I think I am relieved from the obligation, by which I should otherwise feel myself bound, by the observation on *In re Ely* (1) made by Farwell L.J. in the case of *In re Ofner* (2), where he expressed his opinion in clear and unambiguous language that the decision was wrong. Fortified by that expression of opinion and by the series of relevant decisions to which Mr. Lawrence has drawn my attention, and to which apparently the attention of Kekewich J. was not called, I think I can disregard *In re Ely* (1) and consider how far the principles embodied in the earlier cases are applicable to the facts of this one. To begin with, one cannot assume the testator intended to make a devise to a non-existing person, he must have contemplated some person, whom at least he believed to be alive at the date of his will, as the object of his bounty, and the duty of the Court is to ascertain, if practicable, whom he did intend. To do this it is obvious that in most cases recourse must be had to evidence to be found outside the will, and the cases shew that in pursuing the inquiry it is competent for the Court to receive parol evidence. The evidence here proves the death of the nephew named in the will, seventeen years before the date of the will, and that his death was well known to the testator, who desired that a second son born afterwards to the same parents should bear one of the same names as his deceased brother. It further proves that the parents were desirous of meeting the testator's wishes and christened the boy John, but substituted Robert for William as his second name. There is no evidence

(1) 65 L. T. 452. (2) [1909] 1 Ch. 60.

that the testator knew that the boy had been called John Robert, but he always took an interest in the boy, who was constantly staying with him, and there is a piece of testimony which, under the decision in *In re Blackman* (1), I hold to be admissible, to the effect that on one occasion when shooting over the property with the boy, the testator told him that the land would ultimately belong to him. On the evidence I can entertain no reasonable doubt that the testator intended to devise his real estate to John Robert Halston, the second surviving son of his brother Israel, and I so hold.

Then arises the question how the costs of this application ought to be borne. Those of the executors have been provided for by arrangement, but there remain to be dealt with those of the devisee and the lady who claims adversely to him as one of the co-heiresses of the testator. By the consent of all parties the case has been argued on the footing that the Court has jurisdiction to deal on this summons with the question involved, and it has been treated as though it were a summons by executors having the legal estate vested in them under the Land Transfer Act, 1897, asking the opinion of the Court as to the person entitled to require a transfer. Even on this footing the case seems to me to fall entirely within the decision of Kekewich J. in *In re Buckton.* (2) The respondent John Robert Halston asserts his right to possession—the other respondents with one exception concede his right. He has now established his right; if I give costs out of the estate, that is to say out of this real estate, I shall be making the successful party in what is really adverse litigation pay the costs of the unsuccessful party, and if I say no costs I shall still be imposing on the successful litigant a burden which in justice he ought not to have imposed on him. I think, therefore, I am bound to order his costs to be paid by the unsuccessful respondent.

Solicitors: *Browne Webb; Thorne, Mockridge, Owles, Limmer & Wood; C. R. Sawyer & Withall, for H. J. Jefferies & Bygott, Southend-on-Sea.*

(1) 16 Beav. 377.

(2) [1907] 2 Ch. 406, 415.

G. M.

C. A.
1912

EVE J.
Jan. 19, 23.

C. A.
Feb. 5.

CUFF *v.* LONDON AND COUNTY LAND AND BUILDING COMPANY, LIMITED.

[1911 C. 3691.]

Company—Auditors—Duties of—Right of Access to Books of Company—Defalcations—Alleged Negligence of Auditors—Action by Auditors claiming Access to Books—Interlocutory Application for Order for Access—Discretion of Court—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 112, *sub-ss.* 1, 6; *s.* 113, *sub-ss.* 1, 2.

The secretary of a company having been guilty of defalcations, by which loss was occasioned to the company, the directors alleged that the company's auditors had by negligence in the performance of their duties conduced to these defalcations, and refused to give them access to the company's books for the purposes of audit. The auditors thereupon brought an action against the company and the directors, claiming a declaration that they, as auditors, were entitled at all times to access to the company's books, and an order for access thereto. The time having arrived when, in the ordinary course, the audit of the company's accounts by the plaintiffs should be proceeding for the purposes of the next annual general meeting, the plaintiffs made an interlocutory application in the action for an order that the defendants should give them access to the books, and Eve J. made a mandatory order to that effect on the ground that the auditors had a statutory right of access to the books. On appeal to the Court of Appeal:—

Held (by Farwell L.J. and Kennedy L.J.), that it was a question for the judicial discretion of the Court whether the right of access to the books claimed by the plaintiffs should be enforced by a mandatory order, and that such an order ought not, under the circumstances of the case, to have been made upon an interlocutory application, and without any steps to ascertain whether the company were desirous that the plaintiffs should continue to act as auditors or not, and therefore the appeal must be allowed.

Interlocutory Application as after mentioned in an action brought by auditors of a company against the company and its directors to enforce the alleged right of the plaintiffs to have access to the books of the company for the purpose of performing their duties as auditors.

On March 30, 1911, the defendant company, at their ordinary general meeting, appointed the plaintiffs auditors to hold office until the next annual general meeting. The plaintiffs had filled

the same office for many years previously. The examination of the annual accounts by the auditors used to be made between the close of the year and the publication of the balance-sheet for the purposes of the next annual general meeting, usually held in the following March. The auditors also used to make a quarterly investigation of the books, to ascertain to what extent the rents payable to the company on the usual quarter days had been received by the company, and to what extent they were in arrear. In June, 1911, the secretary of the company died, and it was found, after his death, that for a long time past he had been defrauding the company of a considerable amount of money, representing rents which had been treated by him as being in arrear, but which he had in fact collected and appropriated to his own use. The directors alleged that these defalcations could not have gone so far but for negligence by the plaintiffs in the performance of their duties as auditors, because, if they had examined the counterfoils in the books of receipts for rent paid to the company, they would have discovered that the secretary was committing defalcations at an early stage; and a letter was written in July by the company's solicitors to the plaintiffs, intimating that they would be held responsible for any loss or damage thereby occasioned, and suggesting that, under the circumstances, they should resign. The plaintiffs, in reply, denied any neglect of duty, and refused to resign; and they claimed a statutory right to have access to the books of the company for the purpose of discharging the duties of their office. This being refused by the directors, the plaintiffs brought their action, claiming in their writ a declaration that they, as auditors of the company, had, for the performance of their duties, a right of access at all times to the books, accounts, and vouchers of the company, and an order that the defendants should give the plaintiffs access to the same forthwith. The time having arrived when, in the ordinary course, the audit of the company's accounts should be proceeding for the purposes of the next annual general meeting, the plaintiffs made an interlocutory application in the action to Eve J. for a mandatory order that the defendants should give to the plaintiffs access at all times to the books, accounts, and vouchers of the defendant company, and that the defendants

C. A. 1912

CUFF v. LONDON AND COUNTY LAND AND BUILDING COMPANY, LIMITED.

should give to the plaintiffs such information and explanation of all matters relating to the defendant company and its accounts as might be necessary for the performance by the plaintiffs of their duties as auditors of the company, or, in the alternative, that the defendants might be restrained until the trial of the action from preventing their access to the books, accounts, and vouchers of the company.

The motion was heard before Eve J. on January 19, 1912.

P. O. Lawrence, K.C., and *Rolt*, for the plaintiffs.

Gore-Browne, K.C., and *D. M. Kerly*, for the defendants. (1)

Cur. adv. vult.

Jan. 23. EVE J. On March 30, 1911, the defendant company at their ordinary general meeting pursuant to s. 112 of the Companies (Consolidation) Act, 1908, and in accordance with article 124 of their articles of association, appointed the plaintiffs auditors to hold office until the next annual general meeting. The plaintiffs had filled the same office for many years previously. The company's accounts are made up on December 31 in each year, and the annual general meeting is held in the month of March following. The examination of the annual accounts by the auditors is conducted between the close of the year and the publication of the balance-sheet for the purposes of the annual general meeting; and, in addition to this annual examination, the auditors have been in the habit of making a quarterly investigation into the company's books with a view more particularly of ascertaining to what extent the rents payable on the usual quarter days have been received by the company, and to what extent they are in arrear. In June, 1911, the secretary of the company died, and, shortly after his death, it was ascertained by the directors that he had defrauded the company of a considerable sum of money, representing rents treated by him as being in arrear, but which had in fact been collected and appropriated by him to his own use. The directors allege that this dishonesty on the part of their servant was

(1) It is not thought necessary to give the arguments in the Court below as well as those in the Court of Appeal.

facilitated by, and its non-discovery at a very early stage was largely due to, the negligent and ineffectual character of the auditors' investigation of the company's books, accounts, and vouchers; and in July last they intimated to the plaintiffs that proceedings would be instituted against them in due course for the recovery from them of the loss sustained by the company in consequence of their negligence. According to the evidence the proceedings are delayed only until the amount of the actual loss has been definitely ascertained. The directors accompanied the intimation with a suggestion that the plaintiffs should resign their office, and they have in fact instructed a well-known firm of accountants to investigate the company's books, to get out the accounts for the last financial year, and to report to the company thereon.

The plaintiffs repudiate the suggestion that there has been any neglect of duty on their part; they deny that they are under any liability to the company; and they refuse to resign their office. Further they claim to exercise their statutory right of access to the company's books, accounts, and vouchers, and to discharge all the duties incident to the office they hold. The directors refuse to recognize this claim, and, by this action, to which the company and directors are defendants, the plaintiffs ask a declaration substantially in accordance with their claim, and now move for an interlocutory order giving them the access and information to which as auditors they claim to be entitled.

Objection was taken to the granting of any relief in such a case on an interlocutory application, but, regard being had to the facts that this is the time of year when the audit would, in the ordinary course, be proceeding, and that the matters in dispute are mainly points of law, and, so far as they are questions of fact, are already sufficiently ascertained, I do not think that I ought to give effect to the objection.

The substantial question is, are the plaintiffs in a position to enforce against the company and the directors the rights which they assert?

The appointment to the office of auditor carries with it the obligation to perform certain duties of which the most important are those imposed by s. 113 of the Act of 1908. They include the

C. A. 1912 — CUFF v. LONDON AND COUNTY LAND AND BUILDING COMPANY, LIMITED. — Eve J.

making of a report to the shareholders on every balance-sheet laid before the company in general meeting during the tenure of office, such report to state, inter alia, whether in the opinion of the auditor the balance-sheet referred to therein is properly drawn up so as to exhibit a true and correct view of the company's affairs as shewn by the books of the company. Mere compliance with the letter of these statutory requirements involves a comparison of the entries in the books with the figures in the balance-sheet, but no one would suggest that the duty of the auditor is limited to ascertaining that the entries in the books of the company are correctly transcribed or summarized in the balance-sheet. As has been pointed out by the Court of Appeal, he is bound to inquire, and to take trouble to ascertain, whether the books themselves shew the company's true position, and such investigation must of necessity range over an area which covers accounts, vouchers, invoices, and documents constituting the materials out of which the entries in the books originate. In order to enable him to discharge these duties, the auditor is clothed with the statutory powers enumerated in sub-s. 1 of the same section.

The Act (s. 112, sub-s. 6) contemplates the possibility of a casual vacancy arising in the office, but does not in terms empower the auditor to resign, or the company to remove him during his year of office. In the present case it is not necessary for me to consider whether these powers exist, for the auditors decline to resign, and the company have taken no steps to remove them.

In these circumstances what is the position? The auditors are bound to discharge their statutory duties, and in so doing are entitled to assert and exercise the statutory powers conferred upon them. In my opinion the charges of incompetency and negligence afford no sufficient answer to the claim to exercise these powers, nor is there any substance in the objection that the exercise of them will give the auditors an opportunity of ascertaining the evidence on which the company will rely in any action brought against them, the answers to such objection being, first, that there is in fact no such action pending, and, secondly, that, even if there were, the materials to which the

auditors claim to have access would all have to be disclosed to them in such action.

I think, therefore, that the motion is well founded, and that I ought to make a mandatory order in the terms of the first alternative asked by the notice of motion, and I do so.

[The learned judge further ordered that, in the event of the defendants giving notice of appeal before January 30, 1912 (which was done), proceedings on the order should be stayed until after disposal of the appeal.]

The directors of the company subsequently gave notice to the shareholders convening the annual general meeting of the company, which was usually held in March, for February 8, 1912. The plaintiffs then applied to Eve J. to remove the stay, which he did. In the report made by the directors to the shareholders for the purposes of the meeting, they referred to the defalcations of the late secretary, and they stated that there was a question whether the auditors were not liable to the company for damages; that they had placed the books of the company in the hands of an independent firm of chartered accountants; that under the exceptional circumstances they had not allowed the plaintiffs to audit the accounts, but had employed a well-known firm of chartered accountants to examine and certify the accounts for the year; and that at the general meeting the shareholders would be asked to pass a resolution approving the employment of that firm.

The defendants appealed against the order of Eve J. The appeal was heard on February 5, 1912.

D. M. Kerly (*Gore-Browne, K.C.*, with him), for the defendants. The inference from the circumstances is that the application was really made in the interests of the plaintiffs themselves, for the purpose of discovering anything in the books of the company which would be material in the event of an action being brought against them for negligence, rather than in the interests or for the protection of the shareholders in the company. There is nothing to suggest that the shareholders would wish that the plaintiffs should continue to act as auditors, and the

C. A. 1912 — CUFF v. LONDON AND COUNTY LAND AND BUILDING COMPANY, LIMITED.

plaintiffs obviously anticipate that at the general meeting the shareholders will not be in favour of their so acting. If the plaintiffs were seeking to enforce their rights as auditors in the interests of the company, they would sue in the name of the company. They are suing as for the enforcement of a personal right, and the only way in which they could support their action would be by shewing that they are under an obligation to the shareholders, non-performance of which would render them personally liable. They cannot be under any personal liability for non-performance of duties which they have been prevented from performing by vis major. Assuming that they could have been placed in any difficulty in this respect, their difficulty has been met by the calling of a general meeting at which the shareholders will have an opportunity of saying whether the plaintiffs should be relieved of their duties as auditors. Such an order as the learned judge has made ought not to have been made on an interlocutory application, and the stay ought not to have been removed, when in a few days the company will have an opportunity of expressing their wishes in the matter.

[He was then stopped by the Court.]

P. O. Lawrence, *K.C.*, and *Rolt*, for the plaintiffs. The plaintiffs are still in the position of auditors of the company, and, as such, have statutory duties to perform under s. 113 of the Companies (Consolidation) Act, 1908. They are responsible for the performance of those duties, not only to the shareholders, but also to the creditors of the company. The auditors of the company are not servants of the directors, who cannot dismiss them, or dictate to them what they are to do. They are independent officials, whom the company is by s. 112 of the Companies (Consolidation) Act, 1908, bound to appoint, and whose duties are fixed by the statute, with a view to their acting as a check upon the directors, and protecting the shareholders and the public.

[FARWELL L.J. It does not appear to be suggested that the application is made on behalf of shareholders.]

If the plaintiffs fail to perform their statutory duties, they may be made responsible by shareholders or creditors of the company By the Companies (Consolidation) Act, 1908, s. 113, sub-s. 1,

"every auditor of a company shall have a right of access at all times to the books and accounts and vouchers of the company, and shall be entitled to require from the directors and officers of the company such information and explanation as may be necessary for the performance of the duties of the auditors"; and by sub-s. 2 "the auditors shall make a report to the shareholders on the accounts examined by them, and on every balance sheet laid before the company in general meeting during their tenure of office," which report is to state the matters mentioned in the subsequent part of the sub-section. The auditors are entitled to access to the books of the company, in order to make the report on the balance-sheet mentioned in the sub-section to the annual general meeting, and they would be liable to penalties if they failed to do so. There is no statutory provision for the dismissal or resignation of the auditors. They have not resigned, nor have the company affected to dismiss them. They are therefore still responsible for performance of their statutory duties, and they have an absolute statutory right to access to the books for the performance of those duties.

[FARWELL L.J. The argument for the plaintiffs would seem to go to the extent that, the auditors having an absolute statutory right of access to the books, they would be entitled to it, even though the shareholders did not wish them to act, and that, even if an auditor had been convicted of felony, a mandatory order for such access must be made.]

That may be the result of the legislation, but it is not necessary to argue that, for there is no question here of any felonious or dishonest conduct on the part of the auditors. Assuming that the company would have power to dismiss the auditors, they have not done so, and the mere fact that they failed to discover the secretary's defalcations upon inspection of the books, even assuming negligence on their part, is no reason for refusing to allow them to perform their statutory duty.

[FARWELL L.J. What reason was there in this case for making an order that really finally disposes of the action upon an interlocutory application, and why did the learned judge remove the stay, when in a few days the shareholders would have had an opportunity of expressing their wishes in the matter?]

C. A. 1912 — CUFF v. LONDON AND COUNTY LAND AND BUILDING COMPANY, LIMITED.

The annual general meeting being at hand, it was necessary for the performance of the plaintiffs' statutory duty under s. 113, sub-s. 2, of the Act of 1908 that they should have immediate access to the books. Having regard to there being really no substantial dispute as to the facts, it was, under the circumstances, reasonable that the order should be made upon an interlocutory application. There is no reason why the plaintiffs should not be allowed to perform their statutory duty of making a report on the balance-sheet to the annual general meeting of the company. No detriment to the company can possibly result from their having access to the books. [They cited *Leeds Estate, Building and Investment Co.* v. *Shepherd* (1); *Bainbridge* v. *Smith* (2); *Newton* v. *Birmingham Small Arms Co.* (3)]

D. M. Kerly, for the defendants, was not called upon to reply.

FARWELL L.J. In my opinion the order made by Eve J. cannot stand. This is an interlocutory application of a very unusual nature. The plaintiffs, who have been auditors of the defendant company, have had a charge made against them, at present no more than by way of suggestion, that they have been guilty of negligence, inasmuch as it has been discovered, after the death of the secretary of the company in June, 1911, that for some years the auditors have never inspected the counterfoils of the books of receipts for rents paid to the company, which is a land-owning company, whereby, as it is alleged, the late secretary was enabled to embezzle large sums to the loss of the company. That, of course, is not at present anything more than a suggestion by the defendants. But the fact that these counterfoil books were not inspected by the auditors is not disputed. Therefore they have a prima facie case to answer. The directors, being exceedingly dissatisfied with this state of things, told the auditors that they would have nothing more to do with them, and that they were not to act any more as auditors of the company. The auditors desired to inspect the company's books some time ago, after they had received notice of this claim against them, and before anything more had been done. Prima facie it looks as

(1) (1887) 36 Ch. D. 787. (2) (1889) 41 Ch. D. 462.
(3) [1906] 2 Ch. 378.

though the auditors were attempting to get discovery in anticipation of an action likely to be brought against them for negligence, before the issue of the writ, which would be, of course, a hopeless application. But they put their claim on the ground of their duty to protect the rights of the company; and the contention on their behalf goes to this astounding extent: that, although an auditor be a convicted felon, his right is statutory, and cannot, by any possibility, be taken away from him. It may or may not be so. As at present advised, it seems to me extravagant; but, even if it were so, it is one thing to say that a man has a statutory right, and it is quite another thing to say that the Court, in the exercise of its judicial discretion, is bound to grant a mandatory injunction in order to give effect to such right. It is perfectly clear, in my opinion, that the Court is not bound to do anything of the sort. In all cases of this nature, which are matters relating to the internal management of the company, it has always been the practice of the Court to direct a meeting of the shareholders to be convened, in order to see what their wishes are. I cannot assent to the contention of the plaintiffs' counsel as to the supreme position of the auditors. They are servants of the company appointed by the company; and, if the shareholders did not desire them to act, no Court would, by mandatory injunction, force them upon the company. If the company chooses to say in general meeting that, having regard to the non-inspection of these books during all these years, they do not wish that the plaintiffs should act as auditors any more, I cannot see how any Court can possibly compel by way of injunction specific performance of the contract of service of the auditors. In truth s. 112 of the Companies (Consolidation) Act, 1908, which has been very much relied upon, makes the company the appointor of the auditors. By that section the company have a duty imposed upon them to appoint an auditor or auditors to hold office till the next annual general meeting. Prima facie that is their appointment; and, if the auditors are dismissed before then, they have the usual right of action for wrongful dismissal before the expiration of their term of office; and it may be that there will be an answer justifying the dismissal. But, whether that be so or not, to say that they can,

C. A.
1912
CUFF
v.
LONDON AND COUNTY LAND AND BUILDING COMPANY, LIMITED.
Farwell L.J.

C. A. 1912 — CUFF v. LONDON AND COUNTY LAND AND BUILDING COMPANY, LIMITED. — Farwell L.J.

and that this Court will assist them to, force their services upon a company which does not wish for them seems to me to be extravagant.

In this particular case the learned judge has not only dealt with this matter on interlocutory application, although it finally disposes of the action, but he has taken off the stay, although—I am not sure whether he knew it himself, but if he did not know it, we know it now—a meeting has been called for the end of this week, when the shareholders will have an opportunity of expressing their wishes and views as to the retention of these auditors. It may possibly be that the directors will find that they will not be supported by the shareholders in rejecting these auditors. On the other hand the shareholders may reject them. It was held in *Bainbridge* v. *Smith* (1) by the Court of Appeal, in the case of a director who was entitled to act as such by contract on the purchase by a company of the property of a brewery company, that, although the director was so entitled, yet, inasmuch as the company, when assembled at a meeting called by direction of the Court for that special purpose, said they did not wish him to act as director, the Court would not interfere to force him on the company. In the same way the Court would not force on an unwilling company auditors whom they do not approve. I have no difficulty about s. 113. Its provisions refer to the auditor acting as such, and are incident to his exercise of his duties. If he has been, whether rightly or wrongly, dismissed and excluded vi et armis by the company, nobody can make him responsible for not having made out a report or made out accounts, which he cannot physically do. In this particular case the auditors are still further protected by the fact that they have brought an action, which, so far as the present interlocutory application to this Court is concerned, fails. In my opinion there is no ground for interfering in this summary manner to thrust these auditors upon the company, and make the company produce to them all their books, not merely for the purposes of the company, but for the auditors' own purposes. In my opinion, the learned judge ought not to have so interfered. He should at any rate have directed a meeting of the company, and should have let the

(1) 41 Ch. D. 462.

matter stand over till after the meeting had been held. A meeting will be held, and inasmuch as this proceeding is only interlocutory, if the company desire to keep the auditors, different considerations may arise, and perhaps the auditors may like to try their hands again, but, rebus sic stantibus, this order must be discharged.

C. A. 1912 CUFF v. LONDON AND COUNTY LAND AND BUILDING COMPANY, LIMITED.

KENNEDY L.J. I agree, and for the same reasons.

Appeal allowed.

Solicitors: *Hutchison & Cuff; Mayo, Elder & Co.*

E. L.

SOLOMON *v.* ATTENBOROUGH.

C. A. 1912 *Jan.* 24; *Feb.* 5.

[1908 S. 54.]

Executor — Administration — Right to pledge Personal Chattels — Pledge by Executor many Years after Death of Testator—Payment of Debts—Notice of Executorship to Pledgee.

A testator, who died in 1878, by his will, after appointing two persons executors and trustees and giving pecuniary legacies, gave his residuary estate to his trustees upon trust for sale and distribution as therein mentioned. In 1892 one of the executors, without the knowledge of his co-executor, pawned articles of plate belonging to the testator's estate with the defendants, who had no notice that he was not the absolute owner thereof, and he misapplied the money advanced upon them to his own purposes. At the date of the pledge all the testator's legacies and debts so far as they were known had been paid, but the residuary estate had not been completely realized or distributed. On the death of the pledgor the transaction was discovered, and an action was brought by his co-executor and a new trustee against the pawnbrokers to recover the plate:—

Held (reversing the decision of Joyce J. [1911] 2 Ch. 159), that inasmuch as the pledgor had not purported to act as executor, and the defendants had no notice that he was executor, the latter had no title to the plate and must deliver it up to the plaintiffs.

APPEAL from a decision of Joyce J. (1)

This was an action by the trustees of the will of Moses Solomon to recover from the defendants, who were pawnbrokers,

(1) [1911] 2 Ch. 159.

C. A. 1912

SOLOMON v. ATTENBOROUGH.

some articles of plate, forming part of the testator's estate, which had been pledged with them in 1892 by A. A. Solomon, now deceased.

The testator by his will, dated March 20, 1878, appointed the plaintiff J. D. Solomon and his brother A. A. Solomon to be his executors and trustees, and, after giving some pecuniary legacies, devised and bequeathed his residuary estate, including the articles in question, to his said trustees, their executors, administrators, and assigns, upon trust to sell the same and to divide the proceeds as therein mentioned. The testator died on March 20, 1878, and his will was proved by the two executors. A. A. Solomon died in 1907, and R. Chadwick was appointed a trustee of the will jointly with J. D. Solomon. The plate had been left in the sole custody of A. A. Solomon, and after his death pawn tickets were found amongst his effects shewing that in 1892 he had pledged the articles in question with the defendants to secure an advance of 65*l.*, upon which interest was paid by him to the defendants down to the time of his death. He misapplied the 65*l.* to his own purposes. In January, 1908, the trustees for the first time discovered that the articles had been pledged, and the defendants having threatened that unless the pledge was redeemed they would proceed to sell the articles, this action was brought for a declaration that the defendants had no right or title in or to the plate and for delivery over thereof to the plaintiffs. The plaintiffs alleged that the pledge was wrongfully made without the knowledge or consent of the plaintiff J. D. Solomon, and that the money raised was not applied for any purpose of administration, but was misapplied by A. A. Solomon for his own purposes.

The defendants pleaded that if the articles in question formed part of the testator's estate A. A. Solomon was rightfully in possession of them as executor and entitled to pledge the same. It was not alleged or suggested that they had notice of any right, title, or equity affecting the title of A. A. Solomon to pledge the articles, and they claimed to hold them (subject to redemption) as bona fide purchasers for value without notice of any adverse claim, title, or equity. It appeared that at the date of the pledge all the debts and funeral and testamentary

expenses of the testator had been paid, but the beneficiaries had not yet received all their shares in the estate, and an action by originating summons was pending in relation to the estate in which leave had been given to the present plaintiffs to bring this action for recovery of the plate.

Joyce J. dismissed the action, and the plaintiffs appealed.

W. H. Cozens-Hardy and *Roger W. Turnbull*, for the appellants. In 1879 all the debts and legacies had been paid and A. A. Solomon was functus officio as executor; he then held the property as trustee and not as executor. That being so, he had no power as executor acting alone to sell or pledge the plate, and no power as trustee to do so under the will without the consent of his co-trustee: *In re Timmis*. (1) But he could nevertheless have given a good title in 1892 if he had purported to pledge the plate as executor. In fact he pledged it as owner and did not mention that he held it as executor or trustee, and the respondents had no notice of his position.

[Buckley L.J. If the executors had not been the same persons as the trustees could the former after 1879 have asserted a right to retain the plate as against the trustees?]

No. The executors would have had no defence to an action by the trustees. That in this case the executors and trustees were the same persons does not alter the position.

[They were stopped by the Court.]

Hughes, K.C., and *W. M. Cann*, for the defendants. An executor has power to sell the personal estate of his testator and the purchaser need not inquire whether the debts and legacies have been paid. It makes no difference whether he purports to act as executor or not; and his power to sell does not depend on the knowledge of the purchaser.

[Cozens-Hardy M.R. If the executor has assented to a legacy of a specific article he cannot afterwards pledge it.]

He can do so if he can get possession of the article. If a debt of this testator had been discovered in 1892 his executors would have had to pay it; if an asset had been found they alone could have given a receipt for it. A. A. Solomon was still an executor

(1) [1902] 1 Ch. 176.

C. A. 1912

SOLOMON v. ATTENBOROUGH.

and had all the powers attached to that office, and he gave us a good title to the goods although he did not disclose his position: *In re Tanqueray-Willaume and Landau* (1); *In re Whistler* (2); *In re Venn and Furze's Contract.* (3)

[COZENS-HARDY M.R. If those cases support your view at all it is only so far as to shew that an executor who sells land need not be described as an executor in the conveyance.]

There is no decision that disclosure of his position has anything to do with his power. Even if he has parted with an article he can give a title to it if he recovers possession of it, but here the executor was in possession of the plate the whole time. If executors lose their powers when the debts and legacies are paid they might equally lose them within six months of the testator's death. They would not be able to sell his shares. The legal estate in this plate had not passed from A. A. Solomon. No doubt he was liable for what he did, but the purchaser was protected. There was nothing to make the respondents suspect that anything was wrong.

No reply was called for.

COZENS-HARDY M.R. This is an appeal from a decision of Joyce J. It raises a point which has been most ably argued by Mr. Hughes and his learned junior, but a point upon which I cannot myself feel any serious doubt.

The admitted facts are these: the testator appointed his two sons his executors, and died in March, 1878, possessed of some valuable plate; probate of his will was granted to the two executors in October of the same year. The estate was amply sufficient for the payment of his debts, legacies, and funeral and testamentary expenses. The residuary account has been produced here, although it was not produced on the last occasion, and it will of course be entered as read in the order we are now going to make. It appears from that, that the estate was clear in March, 1879, when the residuary account was passed; the duty was paid, and there was a declaration that the balance of the estate was held on trust for the four residuary legatees, of whom

(1) (1882) 20 Ch. D. 465. (2) (1887) 35 Ch. D. 561.
(3) [1894] 2 Ch. 101.

each of the executors was one. Fourteen years after the death of the testator, one of the executors who had physical possession of the plate went to Messrs. Attenborough—who, so far as I can see, were perfectly unconscious of any fraud and certainly must not be taken to be open to any imputation in the transaction—this executor went to Messrs. Attenborough and pawned some of the plate; and, as is now shewn, with the funds thus obtained he paid a private debt that he owed to his co-executor. It is proved to demonstration that the sale of the plate was not required for any of the purposes of the administration and that on the contrary it was pledged for the purpose of discharging and satisfying a debt due from the pledgor to his co-executor. But it is said, notwithstanding that, Messrs. Attenborough had a perfectly good title to this plate. It is contended that one executor can deal by way of sale or mortgage with any chattel forming part of the testator's estate, and that the purchaser or mortgagee is not concerned to consider whether it was required by the executor for the administration of the estate.

I hope no word has fallen from me which will be considered to doubt that; and I do not think the proposition can be stated better or more tersely than it was by Sir John Leach in *Watkins* v. *Cheek* (1), where he says "a mortgagee or purchaser, from the executor, of a part of the personal property of the testator, has a right to infer that the executor is, in the mortgage or sale, acting fairly in the execution of his duty, and is not bound to inquire as to the debts or legacies."

But what does that imply—what does it assert? That it is a case in which the executor comes as executor and deals as executor with a third person; and then that the third person is entitled to assume that he, as executor, is discharging his duties and performing the obligations of the position which he appears to hold, and which he professes to discharge. What has that to do with a case in which the pledgor or mortgagor did not claim to be doing this as executor, did not give any intimation to Messrs. Attenborough that he was an executor, and in which Messrs. Attenborough had no reason to suppose or

(1) (1825) 2 S. & S. 199, 205.

C. A. 1912

SOLOMON v. ATTENBOROUGH.

Cozens-Hardy M.R.

to know that the pledgor was anybody but the absolute owner of the property? In my opinion, to hold that the rule applies to such a case would be straining beyond all authority and beyond all principle the doctrine which is so tersely stated by Sir John Leach and which has been so consistently followed for many years.

We have had our attention called to three cases—*In re Tanqueray-Willaume and Landau* (1), *In re Whistler* (2), and *In re Venn and Furze's Contract* (3); but not one of those cases is in the least applicable to the present one. In every one of them the Court was dealing with a transaction in which the vendor was an executor, was known to be an executor, and professed to be acting as an executor. It is quite true that in *In re Venn and Furze's Contract* (3) Taylor did not state in the deed that the money was required and was intended to be applied for the purpose of administration; but that was not necessary. An executor is not bound in a conveyance or otherwise to say that he sells for executorship purposes, or that the money he receives he is going to apply to executorship purposes. The Court assumes that he will do his duty, and it does not listen for a moment to the suggestion that a purchaser or a mortgagee is entitled to require an executor to say that he is duly administering an estate. In my opinion, that has no reference whatever to a case like this; and, although I do not differ from the statement of the law by Joyce J. as to what an executor can do notwithstanding the lapse of years, I think, with great respect to that learned judge, he has overlooked the point on which this case ought to be decided. He has overlooked the fact that this was not a transaction by a person purporting to deal as executor, but was a transaction in which an individual in his own right as the possessor of plate came into Messrs. Attenborough's shop and pawned the plate; when, in point of fact, he had no right to do so. Messrs. Attenborough can be in no better position than the pledgor; and the pledgor had no title. It seems to me, therefore, that the decision of the learned judge must be reversed, and the relief asked for granted.

(1) 20 Ch. D. 465. (2) 35 Ch. D. 561.
(3) [1894] 2 Ch. 101.

FLETCHER MOULTON L.J. In my opinion this is a very plain case. Only one issue of fact has to be decided by the Court, and then the legal rights of the parties do not appear to me to be open to doubt. Two persons were named as executors of the will of the testator, and they were also named as trustees of the residuary estate, which was to be divided between four persons subject to a certain life interest. There were very few specific legacies and very few debts; of that we have the clearest evidence. The accounts were passed within a year, and it appears that the whole of the administration business had by that time been brought to a termination by the executors, and there is no suggestion that they had overlooked anything. In signing those accounts the executor who performed the duty states that he holds the rest of the estate on the trusts of the will; and I have not the slightest doubt either as a matter of law or as a matter of fact that from and after that time the possession of the estate by those two gentlemen was a lawful possession by them as joint trustees. If the trustees who had been named in the will had been different persons from the executors, that which has happened is exactly the same as if the two persons named as executors had handed over this silver to the other two persons named as trustees. Some fourteen years afterwards, one of the two persons, who were, as I have said, holding the property as trustees, brought the plate to Messrs. Attenborough and pawned it there as plate of his own, obtained the money, and used it for the purpose of paying one of his own debts. There is not the slightest blame or reproach to Messrs. Attenborough; it is one of the risks which pawnbrokers take, that persons who have physical possession of articles come and fraudulently pawn them as their own. If they have no title, of course they cannot give a title. These goods were pawned by a person who was not the owner, because the sale or pawning of these articles could only have been done by the two trustees jointly who had the legal estate in them. Therefore, Messrs. Attenborough cannot keep them now from the true owners, that is to say, the plaintiffs, who are the present trustees, the beneficial interest being of course in the cestuis que trust. For my own part, I can see no difficulty in the matter; and I do not understand what bearing the cases

C. A. 1912

SOLOMON v. ATTENBOROUGH.

Fletcher Moulton L.J.

which have been cited have upon it. I perfectly agree with the learned judge that one can put no limit of time to the office of executor; nor do I think it can be said that an executor has ceased to be an executor because he has passed his accounts. Some claim might turn up and it would find him an executor—not re-create him an executor. But that has nothing whatever to do with this question. The question here is, whether the executors had handed over the estate to the persons entitled to it under the will. In my opinion they had as executors handed it over to themselves as trustees. It is inconsistent with the whole of the facts of this case to say that they continued to have this silver in their hands as executors. The consequence is that what we are deciding now does not in the least decide that these executors might not have kept part of the estate of the testator in their hands for a longer period; and if they had, then during that period even one executor would have been able to deal with it under the well-recognized powers of a single executor. But the proposition the respondents tried to get us to accept was this: that if an article formed part of the personal estate of a testator at the date of his death, then, at all future times and whatever had been the intermediate history of the article, the executor could, by producing the probate, make a good title to dispose of that article. Suppose, for instance, he had himself sold it for the purpose of raising money for the debts and testamentary expenses; is it to be suggested that he could still give a good title to it? Or, supposing it had been a specific legacy, and that the legatee had got it and had sold it, could it be argued that if the executor subsequently obtained physical possession of it he could sell it and give a good title? It cannot be said that because an article has once been part of an estate of which a man is an executor, he can claim to have the rights of an executor over it after it has passed out of that estate.

In this case, therefore, in my opinion, it is clear that the plate had passed out of the hands of the executors, and had passed into the hands of the trustees for the persons to whom it was left, and they had the legal estate in it and the right to dispose of it. If an executor after that, merely because he had physical possession of an article, purported to deal with it as an executor

he could not give any title at law, because it was not part of that estate which was in his hands as executor.

For these reasons, I think the judgment of the learned judge in the Court below cannot be supported.

BUCKLEY L.J. When an executor sells or pledges as executor, the purchaser or the pledgee cannot, except under special circumstances, of which lapse of time since the testator's death may be one, require him to answer as to the position of the estate of which he is executor, so as to shew whether the sale or the pledge is or is not justified by the circumstances. The executor selling as executor can give a good title. That proposition is not one which was disputed by the plaintiffs; and the defendants' counsel at the outset of their argument were asked by the Court to accept that as a proposition which they might assume for the purpose of proceeding with their argument. Notwithstanding, they cited to us three cases—*In re Tanqueray-Willaume and Landau* (1), *In re Whistler* (2), and *In re Venn and Furze's Contract* (3)—which establish that proposition and no other. They were further asked for authority for this proposition: that if a person contracts, not purporting to deal as executor, the purchaser who did not know he was executor can for the purpose of supporting the contract rely on the fact that he was executor. For that proposition they have cited no authority; and, so far as I know, there is none. In *In re Venn and Furze's Contract* (3) the executor was selling as executor, but by the deed of assignment he did not express himself to assign as executor; and Stirling J. had to consider whether that circumstance made a difference, and he held it did not. But it is quite plain that, in that case, Taylor was dealing as executor and that the purchaser knew he was dealing as executor; for the subject of the sale was a lease of 1852, in which it was stated that he was executor, and that the term was granted to him on the surrender of a previous term which had been vested in him as executor. So that plainly in that case as in the other two cases the executor was dealing as executor.

(1) 20 Ch. D. 465. (2) 35 Ch. D. 561.
(3) [1894] 2 Ch. 101.

C. A. 1912

SOLOMON v. ATTENBOROUGH.

Buckley L.J.

The point in this case is one for which no authority has been cited, but on which I myself hold a clear opinion of what is the law. A man, who in point of fact was one of two executors, came to Messrs. Attenborough. He produced some plate, and said that he wished to pledge it. He did not say that he was and Messrs. Attenborough did not know that he was executor. They were perfectly guiltless in the matter. So far as they knew, he was the owner of the plate and they dealt with him on that footing. In point of fact he was not the owner and they cannot maintain their title by saying "The plate was yours, you were the beneficial absolute owner." That was not the fact; it was not his, it was somebody else's; it belonged to persons who were derivatively entitled under him, he being one of two trustees of the plate. Neither can they say "We dealt with you, not as beneficial absolute owner, but as a person having a power, and you had a power because you were executor. Accordingly, we get a good title, because we took from you under that power." That would be their case if they had been dealing with him as executor; but they were not. He did not say that he was executor, and they did not ask him if he was executor. They dealt with him merely on the footing that he was offering this property to them and that it was his. I am not aware of any authority that under those circumstances a person who is in point of fact an executor but does not purport to deal as executor can confer on his purchaser rights which would flow from the fact that he was dealing as executor, if he were so dealing.

The defendants' counsel suggested that if our decision were against them it would lead to great difficulties; and put the case of the ownership of shares. To my mind, there again the matter is quite plain and there is no difficulty at all. Suppose the testator had been the owner of shares, and suppose, as is generally the case, they remained registered in the testator's name and that the executor sold. The executor can execute a transfer of the shares under most articles of association, under all articles I think; but necessarily in that state of facts the purchaser knows that they are the testator's shares, because they come out of the testator's name. The shares stand not in the vendor's name but in the name of somebody else; and the

purchaser plainly sees that the vendor is dealing with somebody else's shares, and thus the executorship is disclosed. If those be not the circumstances, but, as is sometimes the case, though it is very unusual, the shares have been taken out of the testator's name and put into the executor's name, then he is the legal owner of the shares. In that case the registered owner can and does by virtue of his own execution pass the legal title. It is quite plain, therefore, that the difficulty does not exist; it is an imaginary difficulty, not a real one.

It seems to me here that, while the learned judge is quite right in the proposition of law which he lays down, he does not draw the logical conclusion. No doubt this gentleman, notwithstanding the lapse of time, had the authority of executor; he was an executor still, although the property was by this time held by him as trustee; and, if he had gone to the pawnbrokers and purported to deal with the plate as executor, the case would have been entirely different. It is because he did not do so that he could not confer a good title.

I think, therefore, the appeal must succeed; and the plaintiff is entitled to judgment in the action.

Solicitors: *Cox & Lafone; Stanley J. Attenborough.*

NOTE.—*W. H. Cozens-Hardy* subsequently referred the Court to *In re Morgan* (1881) 18 Ch. D. 93, 98.

H. C. R.

WARRINGTON J.

1912

Jan. 19.

JARVIS *v.* HEMMINGS.

[1911 J. 2163.]

Landlord and Tenant—Lease—Underlease—Rent of immediate Tenant in arrear—Notice by Superior Landlord to Under-Tenant to pay Rent to him—Service by Registered Post—Personal Service—Sufficiency of—Law of Distress Amendment Act, 1908 (8 *Edw.* 7, *c.* 53), *s.* 6.

Sect. 6 of the Law of Distress Amendment Act, 1908, provides that in cases where the rent of the immediate tenant of the superior landlord is in arrear it shall be lawful for such superior landlord to serve upon any under-tenant or lodger a notice "by registered post addressed to such under tenant or lodger upon the premises" stating the amount of such arrears of rent, and requiring all future payments of rent, whether the same has already accrued due or not, by such under-tenant or lodger to be made direct to the superior landlord giving such notice until such arrears shall have been duly paid:—

Held, that the requirement of service of the notice "by registered post" was inserted only to enable the superior landlord to effect service by registered post if he desired to do so, and that, the object of the section being that the notice should come to the notice of the person for whom it was intended, personal service of the notice was sufficient.

Walter v. *Rumbal* (1695) 1 Ld. Raym. 53, followed.

Motion.

By an indenture of lease dated September 18, 1875, a piece of land at Camberwell, with a brewery, stable, and outbuildings, known as the Berkshire Brewery, thirteen cottages erected thereon, and other hereditaments and premises were demised by the plaintiff for the term of seventy-seven years from September 29, 1875, at the yearly rent of 350*l.* payable by equal quarterly payments on the usual quarter days. The premises comprised in the lease had recently, it was alleged, been assigned to and were now vested in one Herbert Smythe, who could not now be traced. The brewery was unlet, but the cottages were let to under-tenants at rents varying from 7*s.* to 11*s.* a week.

The rent which became payable on September 29, 1911, not having been paid, the plaintiff instructed his agents to serve on the under-tenants notices pursuant to s. 6 of the Law of Distress

Amendment Act, 1908 (1), requiring them to pay their rents to them. Accordingly on October 7, 1911, notices were served personally on the under-tenants.

Subsequently to the service of these notices, the defendants Frances Ellen Hemmings and Samuel Hughes, who claimed to be entitled to the premises comprised in the lease under some derivative title from Smythe, took various proceedings against the under-tenants by way of distress and otherwise to compel them to pay their rents to them.

On December 7, 1911, the plaintiff issued his writ in the present action, claiming (inter alia) an injunction to restrain the defendants from recovering, receiving, or giving a discharge for any rents payable by the under-tenants so long as any rent owing to the plaintiff by the immediate tenants of the demised premises was in arrear and from in any way interfering with the right of the plaintiff to recover, receive, and give a discharge for such rents or any of them during such period.

The plaintiff now moved for an injunction in the terms of the writ.

The defendant Mrs. Hemmings was not represented at the hearing.

J. W. Manning, for the motion. The defendants are interfering with the plaintiff in the exercise of the statutory right given him by s. 6 of the Law of Distress Amendment Act, 1908, to require the under-tenants to pay their rents to him. The plaintiff has served the notices under the section on the under-tenants personally and not "by registered post" as directed by it, and the only question is whether that was a sufficient compliance with the section. The provision as to registered post is, it is

(1) Law of Distress Amendment Act, 1908, s. 6: "In cases where the rent of the immediate tenant of the superior landlord is in arrear it shall be lawful for such superior landlord to serve upon any under tenant or lodger a notice (by registered post addressed to such under tenant or lodger upon the premises) stating the amount of such arrears of rent, and requiring all future payments of rent, whether the same has already accrued due or not, by such under tenant or lodger to be made direct to the superior landlord giving such notice until such arrears shall have been duly paid, and such notice shall operate to transfer to the superior landlord the right to recover, receive, and give a discharge for such rent."

WARRINGTON J. 1912 JARVIS v. HEMMINGS.

submitted, an enabling provision inserted for the benefit of the superior landlord to avoid the necessity of personal service. Personal service is obviously better service than service by registered post. Personal service of the notices on the under-tenants having been effected, the section has, it is submitted, been sufficiently complied with: *Walter* v. *Rumbal.* (1) That case is treated as good law in Foa's Landlord and Tenant, 4th ed. p. 548, and Woodfall's Landlord and Tenant, 18th ed. p. 551.

The Defendant Hughes in person contended that personal service of the notices was not a sufficient compliance with the section.

WARRINGTON J. This is an application for an injunction to restrain the defendants from recovering, receiving, or giving a discharge for certain rents payable by the under-tenants in respect of certain premises comprised in a lease dated September 18, 1875, under which the plaintiff is lessor so long as any rent owing to the plaintiff by the immediate tenants of the demised premises is in arrear, and from in any way interfering with the right of the plaintiff to recover, receive, and give a discharge for such rents or any of them during such period as aforesaid. The only question I have really to determine is whether the plaintiff has the right to recover, receive, and give a discharge for such rents.

The facts shortly are these. The plaintiff in 1875 demised the premises with others to W. G. Ashby, S. Ashby, and E. Lucas for a term which is still subsisting at an annual rent of 350*l.* The premises comprised in the lease are now vested in some one—I do not exactly know whom. The rent which became due on September 29, 1911, is unpaid, and further rent became due at Christmas and is also unpaid. The plaintiff's case is that on October 7, 1911, he served notices pursuant to s. 6 of the Law of Distress Amendment Act, 1908, on the under-tenants requiring them to pay their rents to him, and that by virtue of those notices he is entitled to the relief he asks. The defendants have done all they could to prevent the under-tenants from paying their rents to the plaintiff, and they contend that the

(1) 1 Ld. Raym. 53.

notices served by the plaintiff did not comply with the Act, and that he is therefore not entitled to the rents. The material provisions of the Act are those contained in s. 6, which provides: "In cases where the rent of the immediate tenant of the superior landlord is in arrear it shall be lawful for such superior landlord to serve upon any under tenant or lodger a notice"—I leave out for the present the words in brackets—"stating the amount of such arrears of rent, and requiring all future payments of rent, whether the same has already accrued due or not, by such under tenant or lodger to be made direct to the superior landlord giving such notice until such arrears shall have been duly paid, and such notice shall operate to transfer to the superior landlord the right to recover, receive, and give a discharge for such rent." The words in brackets are these, "by registered post addressed to such under tenant or lodger upon the premises," which occur after the words "it shall be lawful for such superior landlord to serve upon any under tenant or lodger a notice." The facts in the present case are that the notices of October 7, 1911, were served on the under-tenants personally. There is clear proof of that. But it is objected by the defendants that that service was not sufficient, inasmuch as it did not comply with the requirements of the section. The plaintiff contends that on the true construction of the section the words "by registered post" and so on are inserted as an enabling provision, not as specifying the only mode in which notices may be served, but as specifying a mode by which the superior landlord may be relieved from serving them personally. If the words of the section had been "it shall be lawful for such superior landlord to serve upon any under tenant or lodger a notice" (that is to say without the words in brackets) the only mode in which he could have served it would have been by serving it personally. The plaintiff contends that the words in brackets are inserted only to enable him to effect service by registered post if he wishes. Is that the true construction of the section? Independently of authority I should have thought it was. The section gives the landlord liberty to serve the notice. No service can be better than personal service. The object of the section is that the notice shall come to the knowledge of the person for

WARRINGTON J.

1912

JARVIS v. HEMMINGS.

whom it is intended, and there cannot be any reason why that should be secured by service by registered post rather than by personal service, which is a surer mode of service. I cannot imagine, therefore, that there can be any reason why it should be sent by registered post and in no other way. Therefore on the true construction of the section quite independently of authority I should have thought that the service was sufficient.

But curiously enough there is authority on the point, a case even considerably stronger than the present one. It is the case of *Walter* v. *Rumbal*. (1) That was a case which arose under 2 Will. & M. c. 5, which authorized the sale of goods distrained for rent in case the rent was not paid in a reasonable time. Sect. 1 of the Act provided "that where any goods or chattells shall be distrained for any rent reserved and due upon any demise lease or contract whatsoever and the tenant or owner of the goods soe distrained shall not within five dayes next after such distresse taken and notice thereof (with the cause of such takeing) left at the chiefe mansion house or other most notorious place on the premises charged with the rent distrained for replevy the same with sufficient security to be given to the sheriffe according to law that then in such case after such distresse and notice as aforesaid and expiration of the said five dayes the person distraining" may sell the goods and chattels so distrained as therein provided. The events on which, according to that statute, the landlord may sell are therefore, first, that he must distrain, secondly, five days must elapse from the distress, and, thirdly, notice of the cause of making the distress must have been left at a particular place. In *Walter* v. *Rumbal* (1) the notice in question was not left at the chief mansion or other most notorious place on the premises, but was given to the tenant himself, and it was objected that that was not sufficient, and that accordingly the landlord had not the right to sell. In the report (2) it is stated: "That the notice is ill, for the Act says, that it should be at the chief mansion-house or other notorious place upon the premises; but in this case it was given to the plaintiff himself. Sed non

(1) 1 Ld. Raym. 53. (2) 1 Ld. Raym. 54.

allocatur; for per curiam the intent of the Act was only, that the party should have notice, which is performed by this means, better than if it had been left at the house or other most notorious place." That is a very strong decision; the Act provided that certain consequences were to follow if a certain event happened—the leaving of a notice at a particular place. The precise event described in the Act had not happened, and yet the Court held that the consequences followed.

In my opinion, the personal service in the present case was sufficient; and the rents, therefore, are, under the Act of 1908, payable to the plaintiff. The defendants have interfered with the right of the plaintiff to receive the rents, and there must therefore be an injunction in the terms of the notice of motion against both the defendants, subject as regards the defendant Hemmings to the production to the registrar of an affidavit of service on her of the notice of motion.

Solicitors for plaintiff: *Nash, Field & Co., for Clarke & Son, High Wycombe.*

W. I. C.

C. A.
1912
Jan. 26.

In re NEWDIGATE COLLIERY, LIMITED.
NEWDEGATE *v.* THE COMPANY.

[1912 N. 22.]

Company—Practice—Debenture-holders' Action—Receiver and Manager—Duties—Repudiation of Company's Contracts.

It is the duty of the receiver and manager of the property and undertaking of a company to preserve the goodwill as well as the assets of the business, and it would be inconsistent with that duty for him to disregard contracts entered into by the company before his appointment.

Where therefore a receiver and manager of the undertaking and property of a colliery company had been appointed in a debenture-holders' action against the company, the Court declined to authorize him to repudiate the company's forward contracts for the supply of coal, notwithstanding that since those contracts were made the price of coal had risen, and if the contracts were disregarded a much larger sum would be obtained for the coal.

Decision of Eve J. affirmed.

Appeal from a decision of Eve J. refusing to direct the receiver and manager of the company to disregard certain forward contracts for the supply of coal which previously to the appointment of the receiver and manager had been entered into by the company.

The company was incorporated in 1904, with a capital of 150,000*l.*, to work mines leased to it by the plaintiff. The company had since issued three series of debentures secured upon its undertaking and property present and future, including its uncalled capital, namely, 100,000*l.* 5 per cent. first mortgage debentures, 11,500*l.* 7 per cent. second mortgage debentures, and 20,000*l.* 5 per cent. third mortgage debentures. In December, 1911, the interest on the debentures was twelve months in arrear, and the plaintiff, who was the holder of a large number of the first mortgage debentures and of the whole of the third mortgage debentures, on January 8, 1912, commenced an ordinary debenture-holders' action on behalf of himself and the other first debenture-holders to enforce their security against the company and the representatives of the second debenture-holders. On January 20, 1912, he obtained an interlocutory order for the

appointment of J. T. Browne as receiver and manager of the undertaking and property of the company. When he entered into possession of the colliery the receiver and manager found that in consequence of faults in the coal seams the output had dropped from 6000 to 4600 tons per week, the whole of which output would be required to satisfy the existing forward contracts, about eighty in number, which had been entered into by the company at a time when the price of coal was lower than it was at present. There was evidence that if the receiver and manager were to disregard these contracts he could sell the coal at an increased price of 1*s.* per ton more all round, and so realize an extra profit of 200*l.* a week. There was also evidence that having regard to the possibility of a strike in the near future it was necessary to reserve some of the output for keeping the colliery pumped free from water during any such strike.

On January 24, 1912, the plaintiff took out a summons asking that the receiver and manager might be at liberty to disregard the company's forward contracts for the sale of coal. The summons was heard in chambers by Eve J., who refused the application, but treated the matter as having been heard in Court and gave leave to appeal forthwith.

The plaintiff appealed.

Buckmaster, K.C., and *W. R. Sheldon*, for the appellant. The receiver and manager desires to obtain the direction of the Court with regard to the forward contracts which the company has entered into. In the interests of the debenture-holders he wishes to disregard them. They have been broken already by the appointment of the receiver, and the receiver is not bound by them unless he elects to adopt them. He desires to have the authority of the Court to disregard them.

[BUCKLEY L.J. The question is, ought the Court by its officer to refuse to carry out the company's contracts ?]

The position is really that of mortgagor and mortgagee of a business.

[BUCKLEY L.J. The Court has by its officer at the instance of the mortgagees taken charge of the mortgaged business. Ought not the Court to act as an honourable man would ?]

C. A.
1912
NEWDIGATE COLLIERY, LIMITED, *In re.*
NEWDEGATE *v.* THE COMPANY.

These contracts can only be enforced as against the company. The receiver and manager seeks to know whether he can disregard them without incurring any liability. The effect of the appointment of a receiver and manager upon existing contracts was considered in *Reid* v. *Explosives Co.* (1)

[BUCKLEY L.J. The Court is asked to sanction the doing of something by its officer which will in effect benefit the mortgagees at the expense perhaps of the unsecured creditors.]

The appointment of the receiver relieves the mortgagee from the burden of the position of mortgagee in possession.

[COZENS-HARDY M.R. Is the receiver and manager of a licensed house at liberty to disregard an existing tie on the house?]

It is submitted that he is. The receiver and manager is not the agent of the company and need only have regard to the interests of the debenture-holders: *Burt, Boulton & Hayward* v. *Bull.* (2)

[BUCKLEY L.J. He is not the agent of the company, but he is appointed to carry on its business, and he is acting for all parties under the direction of the Court.

COZENS-HARDY M.R. "The receiver is not the particular agent of any party; he is the officer of the Court": Kerr on Receivers, 5th ed. p. 163.]

The receiver of property burdened with onerous leases constantly comes to the Court for permission to give up possession under the leases and leave the mortgagor liable to the obligations of the leases. Where a receiver and manager is appointed on behalf of the mortgagee of property consisting of licensed houses the Court would give the receiver and manager leave to give up a particular house which was not profitable.

[BUCKLEY L.J. The contention is that the mortgagee of an undertaking may seize the assets and refuse to discharge the debts. I had occasion to consider the rights of debenture-holders having a floating charge on the property and undertaking of the company in *In re London Pressed Hinge Co.* (3)]

In *Husey* v. *London Electric Supply Corporation* (4) the receiver appointed on behalf of debenture-holders of an hotel company

(1) (1887) 19 Q. B. D. 264, 267.
(2) [1895] 1 Q. B. 276.
(3) [1905] 1 Ch. 576.
(4) [1902] 1 Ch. 411.

was held to be at liberty to adopt or reject an agreement made by the company for the supply of electric light.

[BUCKLEY L.J. He was not a manager. That case does not apply here.]

See also *Forster* v. *Nixon's Navigation Co.* (1)

It is the duty of the receiver to safeguard the mortgaged property alone. The unsecured creditors will not get anything in any event. If the receiver and manager is allowed to break these contracts the security will be improved.

E. E. H. Brydges, for the company. There is no precedent for such an order as is sought for upon this application. The receiver was appointed to manage the whole of the business. He is not entitled to seize the assets and disregard the liabilities. The course proposed by him would be detrimental to the company by destroying its credit. There is a wide distinction between this case and that of an ordinary mortgagee of real estate. Here the debenture-holders have a floating charge on the whole undertaking, and the receiver is appointed to manage the whole business. The case of a mortgage of leaseholds is also very different, because there the lessor has the right of re-entry. The receiver in this case really seeks to marshal the assets in favour of the debenture-holders. Such a precedent as this might lead to collusion in other cases.

Buckmaster, K.C., in reply. Here the debentures cover the whole of the assets, so that there can be nothing for the unsecured creditors. If the security proves insufficient, then the creditors cannot be hurt. If there should be a surplus, then the creditors would reap the benefit. Supposing the company were liable on bills of exchange, in the absence of special circumstances the receiver would not be justified in meeting the bills out of the assets. That is very like this case. The receiver ought not to pay unsecured debts in order to maintain the credit of the company. The Court in administering the mortgaged property seeks to preserve it without regard to the consequences to the mortgagor or his unsecured creditors.

COZENS-HARDY M.R. This appeal raises a question of importance and novelty. Certainly I am not aware of any precedent for

(1) (1906) 23 Times L. R. 138.

C. A. 1912

NEWDIGATE COLLIERY, LIMITED, *In re.* NEWDEGATE *v.* THE COMPANY.

Cozens-Hardy M.R.

such an order as the plaintiff is seeking to obtain. It is desirable that we should dispose of the case without delay, otherwise I should have liked to take a little time to express my judgment in more considered terms.

The jurisdiction of the Court to appoint receivers is extremely old, but I believe the practice of appointing a manager is far more modern, and I think it has been settled that the Court will never appoint a person receiver and manager except with a view to a sale. The appointment is made by way of interlocutory order with a view to a sale; it is not a permanency. Take the case of an individual mortgagee of a licensed public-house. If he is merely a mortgagee of the house he has no right to interfere with the goodwill of the business except so far as he may do so by taking possession of the house. He cannot get possession of the stock in trade, or outstanding book debts, or anything relating to the business which might be obtained by the appointment of a receiver and manager. Similarly if he elects simply to take the appointment of a receiver of the property he obtains possession of the house through the receiver, and being in possession can do exactly what he likes with it, but he has no interest in the goodwill and he has no right to the stock in trade or book debts. If, however, he elects to take an order for the appointment of a receiver and manager of the licensed house,—and it has been settled in comparatively recent years that he can do that—then, I think, he is in a different position. If he elects to obtain the appointment of a receiver and manager of the business including the stock in trade and book debts, it is just as much the duty and the business of the receiver and manager to protect the goodwill and to guard against the destruction of the business or injury to the goodwill, as it is the duty of the receiver of mortgaged property, not being manager also, to take care that the property is preserved so far as it reasonably may be for the benefit of all whom it may concern—the mortgagees and the mortgagor. There are really two separate properties comprised in a security of this kind—first, the property of which a receiver only is appointed, and secondly, the goodwill of the business of which a manager is appointed. Now it is said here that if an individual mortgagee

had taken possession of this colliery he would not have been bound by the company's contracts; he would have taken possession of the unworked coal at his own risk as mortgagee in possession, or if a receiver had been appointed on his behalf the receiver would have sold the coal as he liked. The mortgagee would have said, "I have nothing to do with the goodwill of this business, I have no charge upon it; I do not care whether it is damaged or not, and it does not concern me in the least"; but if he elects to have a manager appointed and takes upon himself through the manager the duty of carrying on the business, it is his duty to do nothing which will destroy, or prejudicially damage, the goodwill of the business at a time when it is not, and cannot be, apparent that the mortgagor may not have a real interest in the equity of redemption both of the colliery itself and of the business.

But we are asked to say, in circumstances which I think I can state in a sentence, that the receiver and manager has a wider right. This is a colliery in which there are forward contracts going to the end of this year, contracts entered into at a time when coal was at a lower price than it is now, which it is said will practically exhaust the full produce of the colliery. Coal has now risen considerably in price, and the colliery, apart from the business, would be no doubt more valuable if it could be worked without regard to these forward contracts, for a larger figure could be obtained for the coal. But if the mortgagee were allowed to abandon these forward contracts he would practically be discontinuing the company's business, because these contracts substantially take the whole of the output from the colliery. Is it fair, is it right, or is it reasonable that the mortgagee who has chosen not merely to act as mortgagee in possession of the colliery, but to take possession of the goodwill and book debts of the business also, should be entitled to say "I will discontinue the business of which I have thought fit to appoint a manager, and I do it because I think there will not be any surplus coming to the mortgagor and because it will be an advantage, not in respect of the goodwill of the business, but in respect of my position as mortgagee of the colliery"? In my opinion that is not the true view. There may be circumstances in which the Court might hold on

C. A. 1912

NEWDIGATE COLLIERY, LIMITED, *In re.* NEWDEGATE *v.* THE COMPANY.

Cozens-Hardy M.R.

the application of the receiver and manager that it was desirable, or essential, for the purpose both of the colliery and the business that a certain amount of money should be raised, and might make an order in the presence of all parties, even at this early stage of the action, directing that it should be raised in advance of everybody, and repaid out of money realized by a sale of the coal; but I am not prepared to say that it can be right to do what we are asked to do here, namely, to make a general order allowing the receiver and manager to break these contracts simply because it would be very beneficial to the mortgagee that that should be done. I do not quite like the phrase "break these contracts," because it is not a question of breaking them. They are still subsisting, but it is impossible to suggest that the receiver and manager is under any liability to the persons who have entered into them. In my opinion they are not contracts with him; they are contracts made with the company, which is still a company, and has not yet been wound up. If he discharges the obligations of the company under the contracts he will be entitled to receive the money due from the other contracting parties to the company; but to say that he is under any personal liability with regard to the contracts and that he ought to be indemnified or relieved in respect of them is entirely to misunderstand the position of a receiver and manager.

I am anxious to deal with this matter in the general way in which it has been raised, namely, as an application that the receiver and manager may be at liberty to disregard practically all the contracts of this business and start entirely afresh. That is what it really comes to. To accede to such an application without the clearest possible evidence that there is, and can be, no possibility of the mortgagor ever having any substantial interest in the assets of this company would be very wrong. That was the view taken by the learned judge in the Court below. He said it was an entirely novel application for which no precedent could be found, and that it seemed to him, as it does to me, to be an application for leave for the receiver and manager to do something inconsistent with his duties, seeing that he was at least as much under an obligation to preserve the goodwill of this business from injury or destruction as to prevent

the mine itself from being damaged by water or otherwise. What I have said will not in any way prevent the receiver and manager making a particular application under special circumstances dealing with a particular contract, but to ask for this general authority is altogether wrong. I think the view taken by Eve J. was quite right.

FLETCHER MOULTON L.J. I am of the same opinion. I also wish to answer the question before us in the general form in which it is asked. It may well be that in this case a special application of an analogous character might be made to which the Court might feel able to accede; but at present we are simply asked to allow the receiver and manager to proceed on the principle of declining to fulfil contracts which at the present moment are onerous. In my opinion the Court would be doing very wrong if it gave permission for anything of that kind. Here the mortgagees have as part of their security the assets of the company, and, supposing they contented themselves with enforcing their security over these assets, no question of this kind could arise; they would have a perfect right to take the coal and to sell it, as it is not specifically appropriated to any outside customers. But part of their security is also the undertaking of the company, and they have obtained the appointment of a receiver who is also to manage this undertaking. They have obtained this appointment by what is clearly an interlocutory proceeding, although perhaps on account of the peculiarities of the case it may continue until there is an actual sale of the property and business. That they have a right to do, because the undertaking of the company is part of their security. The goodwill of the company is therefore part of that which is charged to them, and the receiver and manager has, in my opinion, to do his best to preserve the whole of the property that is put in his care. It is not his duty to do what would ultimately sacrifice the value of the undertaking and to consider it a sufficient justification that by so doing he would obtain somewhat more money from the sale of the specific assets of the company. I certainly decline to be a party to authorizing in general any such conduct. In my opinion it might well ruin the whole reputation of this company and destroy

C. A.
1912
NEWDIGATE COLLIERY, LIMITED, *In re.*
NEWDEGATE *v.* THE COMPANY.
Fletcher Moulton L.J.

the value of the undertaking from the point of view of the goodwill, and I cannot shut out from my mind that by breaking the contracts the receiver and manager would not only do damage to third parties, but would increase the amount of the company's unsecured liabilities. It seems to me that the receiver and manager ought to do his best to preserve the property as a whole and not to increase the value of one part of it at the cost of another; and this is especially the case where he has been appointed early in the proceedings. For these reasons I think that the learned judge was right in refusing to give the authority requested, and that this appeal must be dismissed.

BUCKLEY L.J. The defendant company is a company working a colliery in Warwickshire, and in connection with its business it has entered into contracts for the sale of coal extending over various periods. The longest of them will extend to December in this year. It has issued debentures in three series to the aggregate of 131,500*l.*, and they are debentures effecting equitable charges upon the whole undertaking of the company and its property, present and future, including uncalled capital. On January 8 a writ was issued in a representative action properly constituted to enforce the security of the debenture-holders, and on January 20 an order was made for the appointment of a receiver and manager. On January 24 the receiver and manager took out a summons asking that he might be at liberty to disregard the contracts made by the defendant company for the sale of coal; he wishes to be directed to proceed so as not to fulfil the contracts entered into by the company for forward delivery of coal. It appears that the weekly output of the colliery was about 6000 tons a week, but, owing to physical difficulties over which the company has no control, it dropped to 4600 tons a week, and the evidence is to the effect that in substance the forward contracts would exhaust 4600 tons a week. As is notorious, and as appears by the evidence in this case, the value of coal has recently very largely risen, and if the Court were to make the order asked for, the receiver and manager would be directed to refuse to perform the existing contracts for the sale of coal in order that he might

sell it at the enhanced price it now commands, with the result that the company would be liable on the contracts for damages for breach thereof. The question is whether the Court ought to give such a direction as that. Something has been said about these contracts being binding upon the receiver and manager personally. That is not so at all. The receiver and manager is a person who under an order of the Court has been put in a position of duty and responsibility as regards the management and carrying on of this business, and has standing behind him—I do not know what word to use that will not create a misapprehension, but I will call them "constituents"—the persons to whom he is responsible in the matter, namely, the mortgagees and the mortgagor, being the persons entitled respectively to the mortgage and the equity of redemption. If we were to accede to the application which is made to us, and to allow the receiver and manager to sell the coal at an enhanced price, the result would be that the enhanced price would fall within the security of the mortgagees and they would have the benefit of it; but, on the other hand, there would be created in favour of the persons who had originally contracted to purchase the coal a right to damages against the mortgagor, the company, with the result that there would be large sums of damages owing. Thus, while the increased value of the coal would be thrown into the security for the benefit of the mortgagees, the surplus assets of the mortgagor, whatever they might be, would be affected in the sense that they would be the subject of claims not only by the present unsecured creditors, but also by the persons who had thus become entitled to damages for breach of contract. A receiver and manager owes a duty to two classes of persons. The order asked for would have the effect of allowing him to do an act which would benefit one class to the injury of the other. It has been truly said that in the case of a legal mortgage the legal mortgagee can take possession if he choose of the mortgaged property, and being in possession can say "I have nothing to do with the mortgagor's contracts. I shall deal with this property as seems to me most to my advantage." No doubt that would be so, but he would be a legal mortgagee in possession, with both the advantages and the disadvantages of that position. This appellant

C. A. 1912 NEWDIGATE COLLIERY, LIMITED, *In re.* NEWDEGATE *v.* THE COMPANY. Buckley L.J.

is not in that position. He is an equitable mortgagee who has obtained an order of the Court under which its officer takes possession of assets in which the mortgagee and mortgagor are both interested, with the duty and responsibility of dealing with them fairly in the interest of both parties. It seems to me that an order of the kind we are asked to make would be an order in the interest of one of these parties in disregard of the interest of the other.

Then it has been argued, and it is true, that primarily and principally the duty of the receiver is to have regard to what will benefit the mortgaged property and nothing besides the mortgaged property; this property goes to the mortgagee first, and to the owner of the equity of redemption afterwards; and it is said that so far as the mortgaged property is concerned the order asked for will increase its value because the coal now in the bowels of the earth will be sold at an enhanced price. That is no doubt true, but the security of the mortgagee is on the undertaking and all the property present and future, including the uncalled capital, of this company. So that the property for which the receiver and manager is responsible includes this business and undertaking, and it is his duty to do, and our business to see that he does, everything reasonable and right for the protection of the property as an undertaking for the benefit of all the persons interested in it. The order asked for is an order directing the receiver and manager to disregard the interests of one of his constituents, the mortgagor, in order to benefit another of his constituents, namely, the mortgagee. It seems to me that such an order is necessarily wrong. No precedent has been cited for such an order, I have never heard of such an application before, and it seems to me in principle to be wrong. It is the duty of the judge who has taken control of the assets to deal with those assets with due regard to the interests of everybody concerned, and not to advance the interests of one of the persons concerned at the expense of the other. For these reasons I think the order was rightly refused by Eve J.

Solicitors: *Lowe & Co.; Cooper & Co., for Davies, Sanders & Swanwick, Chesterfield.*

G. A. S.

In re EARL OF DERBY AND FERGUSSON'S CONTRACT. (1)

JOYCE J.
1911
Nov. 7, 8

[1910 D. 154.]

Vendor and Purchaser—Agricultural Land—Sale subject to Tenancy—Condition of Sale—Inspection of Lease or Agreement previous to Sale—Terms of Tenancy—Constructive Notice—Claim by Tenant after Completion—Compensation for Improvement—Landlord's written Consent—Liability—Agricultural Holdings Act, 1908 (8 *Edw.* 7, *c.* 28), *ss.* 1 *and* 2 *and Sched. I., Part I.*

A consent in writing given under the terms of a lease (and *semble*, a similar consent under the Agricultural Holdings Act, 1908) by a landlord to a tenant making improvements during his tenancy, for which improvements, being made with such consent, he becomes entitled to compensation, is a term of the tenancy within a condition of sale affecting purchasers with notice of the terms of all existing tenancies; and if any claim for compensation for such improvements arises after the date fixed for completion of the sale, it must be borne by the purchaser.

Vendor and Purchaser Summons.

On June 9, 1909, at a sale by public auction of the Earl of Derby's Kent estates, T. C. C. Fergusson became the purchaser of lots 32 and 33, which comprised a farm, parts of two other farms, woods and plantations, all specifically described in the particulars, which described lot 33 as "well-timbered park-like pasture and arable and fruit land" and stated that parts of lots 32 and 33 with other lands included in lot 1 were let to Mr. George Barnes on a yearly tenancy at the rent of 180*l.* for the entirety, and among the items given in the particulars certain parts of lot 33, comprised in Barnes' tenancy and numbered 538 (part) (2r. 34p.), 539 (4a. 3r. 35p.), both in the parish of Seal, and 5 (5a. 0r. 12p.) in the parish of Wrotham on the plan annexed to the particulars and containing altogether 10a. 3r. 1p., were described as "bush fruit."

The conditions of sale material to this report were Nos. 3, 12, and 19.

The third condition fixed September 29, 1909, as the day for completion and provided that "a purchaser paying the balance

(1) Reported by special request.

JOYCE J. 1911 — DERBY (EARL) AND FERGUSSON'S CONTRACT, *In re.*

of his purchase-money is as from that day to be let into possession, or receipt of rents and profits, and pay all outgoings, and up to that day all rents, rates and taxes, and other outgoings, are (if necessary) to be apportioned, and the balance is to be paid by, or allowed to, such purchaser on completion."

The twelfth condition provided as follows: "Abstracts or copies of the leases or of the agreements if in writing under which the tenants hold can be inspected at the offices of the vendor's solicitors during the period of fourteen days next preceding the day of sale or in the sale room at the time of sale, and the purchasers are to be deemed to have notice of and to take subject to the terms of all the existing tenancies whether arising during the continuance or after the expiration thereof, and such notice shall not be affected by any partial or incomplete statement in the particulars with reference to the tenancies and no objection is to be made on account of there not being an agreement in writing with any tenant."

The nineteenth condition, so far as material, provided that "The several lots are believed to be and are to be taken as correctly described and any incorrect statement error or omission found in the particulars or the plan or these conditions is not to annul the sale nor entitle a purchaser to be discharged from his purchase, nor is the vendor or any purchaser to claim or be allowed any compensation in respect thereof except that if in the case of any rent or any outgoing mentioned in the particulars there is an error exceeding 1*l.* per annum a compensation shall be allowed to the vendor or purchaser as the case may be and the amount of compensation shall be settled by the auctioneer . . . ."

Neither previously to nor at the sale did the purchaser inspect or ask to inspect the lease or agreement affecting the property purchased by him, and in fact the vendor's solicitors had not in their possession any lease or agreement, or counterpart of any lease or agreement, nor did they know of the existence of any lease or written agreement affecting the lots in question.

Owing to some question relating to an exchange between the respective purchasers of lots 32 and 33 and lot 1 of certain easements, completion was delayed and did not eventually take place until February 11, 1910.

On September 6, 1909, the vendor's solicitors wrote to the purchaser's solicitors asking whether the purchaser would be prepared to assist the purchaser of lot 1 in putting an end to Barnes' tenancy of the detached portion of lot 1 comprised in his tenancy above mentioned, and in reply the purchaser's solicitor wrote on September 10 that he would concur with the purchaser of lot 1 in putting an end to the tenancy of the detached portion in question, and as the result of a subsequent interview between the vendor's and the respective purchasers' solicitors the vendor's solicitors gave Barnes notice determining his tenancy on October 11, 1910.

On September 30, the purchaser for the first time discovered that Barnes alleged that he had in his possession a letter dated in 1902 and signed by the agent of the vendor's predecessor in title consenting to the planting by Barnes of part of lot 33 with black currant bushes.

"Planting of orchards or fruit bushes" is one of the improvements mentioned in Sched. I., Part I., of the Agricultural Holdings (England) Act, 1883, and also of the Agricultural Holdings Act, 1908.

On the same day the purchaser's solicitors wrote to the vendor's solicitors informing them of their discovery and asking that the vendor should settle the tenant's claim for compensation before completion or give a written undertaking to do so. To this the vendor's solicitors replied that the claim for compensation was a matter which under the contract concerned the purchaser. Further correspondence ensued, and the purchaser's solicitors on January 19, 1910, wrote to the vendor's solicitors saying that they were about to take out a vendor and purchaser summons to determine the question of the liability for the tenant's claim in respect of the fruit bushes and suggesting that it would be in the interest of both parties to complete the purchase as soon as possible, which they themselves were willing to do without prejudice to the outstanding question of the liability referred to. To this the vendor's solicitors replied on January 20, 1910, that they had "no objection to completion taking place at the earliest possible date without prejudice to the position of the parties under the contract." The present summons was thereupon issued by

JOYCE J. 1911 — DERBY (EARL) AND FERGUSSON'S CONTRACT, *In re.*

the purchaser on January 29, 1910, for a declaration that the vendor was bound to make compensation to the purchaser in respect of such claim as the tenant of 10 acres 3 roods and 1 perch or thereabouts of fruit bushes included in the above-mentioned contract might make against the purchaser under the Agricultural Holdings Act, 1908, in relation to the planting of the said fruit bushes.

Completion took place on February 11, 1910.

After the issue of the summons, the tenant, Barnes, found the written consent of his landlord's agent, dated December 13, 1902, to the planting of four and a half acres of currant bushes, and also the lease for seven years, dated October 11, 1875, under which he had originally held and had continued after the expiration of that term as a yearly tenant pursuant to an agreement dated August 20, 1883, indorsed on the lease.

The vendor's solicitors had always previously to the finding of this lease asserted that the tenancy was a verbal one, as they had no knowledge of the lease, Lord Derby having bought the estate subsequently to 1883 and no counterpart of the lease having been handed over to him.

By the indorsed agreement the lessor agreed with the lessee (inter alia) "to allow to the lessee at the determination of the tenancy a valuation in respect of all fruit trees and fruit bushes planted by him with the written consent of the lessor or her agent since the 11th day of October 1882 and previously to the expiration of the tenancy and which shall at such expiration be in a healthy state such valuation to be ascertained by arbitration" as to nut trees and standard fruit trees as therein provided, and "all fruit bushes (such as currants raspberries gooseberries and the like) are to be dealt with in like manner and shall be deemed to have attained their full value at the end of five years and shall decrease in value proportionately for nine years."

In January, 1911, the purchaser received from Barnes a claim for 50*l.* in respect of the planting of the fruit bushes in question, which claim the purchaser satisfied after giving notice thereof to the vendor's solicitors.

It appeared that in fact Barnes had never quitted his holding so far as the same was comprised in the land sold to the

purchaser, but had continued, and at the hearing of the summons was still, in possession of the holding as tenant to the purchaser.

Hughes, K.C., and *Gurdon*, for the purchaser. This summons was originally issued in respect of a claim under the Agricultural Holdings Act, 1908, before the tenant's agreement was found. The tenant has since produced the written consent given on behalf of his landlord in 1902 to the planting with fruit bushes of four and a half acres of the property bought. Under this agreement the tenant is entitled to compensation in manner therein provided, the amount of which has been agreed at 50*l.* and paid to the tenant by the purchaser. The claim is precisely similar to a like claim under the Act, Sched. I., Part I., and by s. 2 of the Act the compensation payable under the agreement is to be substituted for compensation under the Act.

The purchaser first heard of this claim more than three months after the date of the contract; and thereupon he required the vendor to discharge it. The twelfth condition is said to exonerate the vendor on the ground that this liability was a term of the existing tenancy, but we submit it was not a term of the tenancy at all, but a statutory right.

If the vendor had known of and produced the tenant's lease and the subsisting agreement, possibly the purchaser might have had to take the risk. The vendor was bound to disclose the possibility of this claim, and his ignorance of it or the absence of the documents will not relieve him.

The liability is in the nature of an incumbrance not disclosed. Sect. 35 of the Act makes it a charge on the property. It is the right of the tenant to have something paid to him at a certain time and is something outside his tenancy agreement, being only imposed conditionally on the previous written consent of the landlord. If the improvement had been one not requiring consent the purchasers would have had to take subject to it, but as the landlord had given his consent, the vendor ought to have disclosed the fact. It is an unusual term of a tenancy, and in the circumstances the vendor could not get specific performance without compensation: *Caballero* v. *Henty* (1), which case shews

(1) (1874) L. R. 9 Ch. 447.

JOYCE J. 1911 — DERBY (EARL) AND FERGUSSON'S CONTRACT, *In re.*

that the extension of the doctrine in *Phillips* v. *Miller* (1) to cases which still rest in contract cannot be sustained: Dart's Vendors and Purchasers, 7th ed. p. 885. If a vendor is not bound to mention that he has given a tenant written authority to make improvements under the Act, a purchaser might find that he had to pay the tenant for the improvement which gave the property its main value.

Norton, K.C., and *Bovill*, for the vendor. This was clearly an outgoing for which the purchaser is liable under the third condition.

It is also a term of the tenancy of which under condition 12 he is to be deemed to have notice. If the claim does not come under the agreement, but comes under the Act, it is still a term of the tenancy, and a usual term, just as much as, for instance, the statutory power of sale is one of the usual terms of a mortgage, and the purchaser took subject to this term: *Phillips* v. *Miller* (1); *James* v. *Lichfield*. (2)

Since *Caballero* v. *Henty* (3) it is said that unusual terms must be mentioned, but this term is, I submit, a usual term. But even if it was an unusual term the purchaser was given a proper notice and opportunity of inspecting the tenants' agreements, and if he had asked for this tenant's agreement the vendor would have been bound to produce the agreement and the written consent. But as the purchaser made no inquiry as to the tenant's agreement and made no attempt to inspect it, he takes subject to all the terms thereof whether usual or unusual: *In re White and Smith's Contract* (4); *Molyneux* v. *Hawtrey*. (5)

The vendor has fulfilled all his obligations within the requirements of *Caballero* v. *Henty*. (3) He gave the purchaser the fullest opportunity of ascertaining what the terms of the tenancy were and the purchaser neglected to inform himself thereof. If the purchaser had asked for the tenant's agreement and the vendor had omitted to produce either the agreement or the written consent the case might have been different.

(1) (1874) L. R. 9 C. P. 196.
(2) (1869) L. R. 9 Eq. 51.
(3) L. R. 9 Ch. 447.
(4) [1896] 1 Ch. 637.
(5) [1903] 2 K. B. 487.

The purchaser's position is entirely due to his own laches. Moreover the purchaser is asking for specific performance with compensation which he cannot get under condition 19, and though perhaps apart from condition 12 the vendor could not have enforced specific performance without compensation, yet we submit, even apart from that condition, that the purchaser has no right to compensation as he has chosen to complete.

Hughes, K.C., in reply. This is not a question of compensation within condition 19. It is neither misdescription nor an omission from the particulars. It is the case of an undisclosed incumbrance on the property. If the purchaser completes he has notice of the rights of a tenant, but he does not get notice of those rights before he enters into the contract. There is no such rule as between a vendor and a purchaser; that was pointed out in *Caballero* v. *Henty* (1), and for this purpose *Phillips* v. *Miller* (2) is not a high authority, for it was heard a few months before the appeal in *Caballero* v. *Henty* (1) came before the Lords Justices.

So long as the matter rests in contract a purchaser is not affected with notice of the terms of a tenancy; he is only affected after completion.

[JOYCE J. If completion had not yet taken place, could the vendor have compelled completion without compensation, or the purchaser have compelled it with compensation? If not, what is the position?]

I do not think so. Completion, however, has taken place, but without prejudice to the question of this liability which is to be decided as if before completion.

I submit the purchaser is entitled to have this charge paid off by the vendor.

JOYCE J. This is a vendor and purchaser summons by the purchaser against the vendor and it asks for a declaration that the vendor is bound to make compensation to the purchaser in respect of such claim as the tenant, that is Barnes, of 10 acres 3 roods and 1 perch or thereabouts of fruit bushes included in the above-mentioned contract may make against the purchaser

(1) L. R. 9 Ch. 447. (2) L. R. 9 C. P. 196.

JOYCE J. 1911

DERBY (EARL) AND FERGUSSON'S CONTRACT, *In re.*

under the Agricultural Holdings Act, 1908, in relation to the planting of the said fruit bushes.

Now the question which it is said I have to determine arises between the parties in this way. [His Lordship stated the facts relating to Barnes' lease and subsequent yearly tenancy under the agreement and to the planting in 1902 with the landlord's consent in writing of the four and a half acres of currant bushes, and continued:] Then under the Agricultural Holdings Act of 1908 the tenant would be entitled on leaving to compensation according to the usual scale—practically compensation for what I may call roughly the value unexhausted of the fruit bushes; and that would have been so also by the agreement under which he held, because that agreement provided in a similar way that the landlord was to allow the lessee at the termination of the tenancy a valuation in respect of all fruit trees and fruit bushes planted by him with the written consent of the lessor.

That being the position between the parties, the reversion on this tenancy was put up for sale in the year 1909, and the applicant is the purchaser under the sale which then took place, and the respondent is the vendor. The lot which comprises the lot in question is 33, containing 177 acres, described in the particulars as "well-timbered park-like pasture and arable and fruit land," and when that description comes to be set forth in detail there are included the following further detailed particulars: "Bush fruit 2 roods 34 perches," "bush fruit 4 acres 3 roods 35 perches"—these are in the parish of Seal, and are the fruit bushes or currant bushes which are now in question—and there are also in the parish of Wrotham "bush fruit 5 acres and 12 perches," and those figures taken together make up the 10 acres 3 roods and 1 perch mentioned in the summons.

The third condition provides for completion. [His Lordship read the third, twelfth, and nineteenth conditions as above set out, and continued:]

The auction sale was in June, 1909, and in October, 1909, pending the completion of the purchase notice to quit was at the request of the purchaser given to the tenant, who would thus become entitled to some compensation or other for unexhausted

value of his trees when his tenancy came to an end in October, 1910. The parties go on disputing about the liability to pay this compensation, but the completion took place in February, 1910, on the terms of two letters which have been read and being in effect—I may put it shortly—without prejudice.

What the vendor says, as I understand it, is this. Under the terms of the tenancy and under the terms of the Act of Parliament which everybody knows, the tenant would be entitled to compensation on the expiration of his tenancy, which was to expire in October, 1910, the completion being in February, 1910. It is a liability imposed by statute and a liability imposed also by the tenancy agreement, and under the twelfth condition the purchaser must be taken to have notice of all terms of the tenancy, and it was at the time of the sale one of the terms of the tenancy that the tenant would be entitled to compensation when he left in October, 1910, or whenever he did leave, so far as the value (I will call it the value, although it is not a very apt expression) of his planting was unexhausted.

That the purchaser had notice of all that, and that the vendor was under no liability at all to the tenant, I think is clear. As a matter of fact, the tenant has with the consent of all parties been settled with for 50*l.*, which is the sum now in dispute.

What the purchaser contends is that this sum of money, the 50*l.*, which the tenant obtained was an undisclosed incumbrance, and he contended that he was entitled to compensation notwithstanding condition 19. I must say I have some difficulty in following that argument, but the purchaser contends that the vendor was bound to give express notice to him of the facts as to the bushes, telling him by whom they were planted and that they were planted with the consent of the landlord. If that be so, it appears to me that he was equally bound to give notice in the particulars of any improvements which might have been made by the tenant that fall within Part III. of the First Schedule to the Act,—excluding the last, that is repairs,—and he would have to give notice as to whether the tenant had chalked the land or clay-burnt it or limed it or marled it and so on, which strikes me as a rather curious proposition. I should have thought prima facie, that knowing of the Act, and whether he knew of the agreement

JOYCE J. 1911 DERBY (EARL) AND FERGUSSON'S CONTRACT, *In re.*

or not—for he must by reason of the twelfth condition be taken to have known that there might be improvements,—he ought to inquire if he wants to find out whether there have been any improvements and whether there is any liability in respect of any improvements.

Now I put it to Mr. Hughes this morning, and practically he is compelled to admit, that, if we were dealing with this before completion, on the morning of the day for completion, the vendor could not compel the purchaser to complete without giving him compensation, and that the purchaser could not compel the vendor to complete with compensation. If that be so, the result of these proceedings would be that this summons would have to be dismissed and each party bear his own costs. That would be a rather lame and impotent conclusion to these proceedings, although I cannot say I have much sympathy with them, but, seeing the expense that has been incurred and the small amount in dispute, I must say who is to bear this liability for the 50*l.*

I think upon the whole that the purchaser having notice of the terms of the tenancy by reason of condition 12 must be taken as knowing that one of the terms of the tenancy was that the tenant should be compensated. This claim for compensation might never arise, if at all, until long afterwards. I do not see how the vendor could remain under a liability to pay such compensation, to which the claim might not arise until years after completion. What the purchaser should have done was to have made a requisition upon the subject and inquired.

Therefore, as I am asked to determine by whom this 50*l.* is payable, I am of opinion that it is payable by the purchaser, but, looking at the amount in dispute and all that has taken place, and the difficulty of finding out what the facts were and the general complication, I make no order as to costs.

Solicitors: *Gadsden & Pennefather; Lawrence, Graham & Co.*

R. M.

C. A.
1912
Feb. 9, 12.

In re LORD NUNBURNHOLME.
WILSON *v.* NUNBURNHOLME.

[1910 N. 1468.]

Will—Construction—Legacy—Gift of Capital and Accumulations of Income at Twenty-six—Previous Trusts—Vested or contingent—Severance.

The testator charged his debts and the estate duty payable in respect of his estate upon the income and profits of certain shares in a company and bequeathed the shares to trustees upon trust out of the income thereof to augment the income of his daughters and to pay his son an annual sum of 3000*l.* until he should attain the age of twenty-six, and, when and so soon as he should attain that age, to hold the shares and the accumulations of income arising therefrom upon trust for his son absolutely. There was no gift over. The son survived the testator and died at the age of twenty-three, a bachelor and intestate:—

Held, on the true construction of the will, that inasmuch as there was no severance of the shares from the rest of the estate the son's interest in the shares was contingent, not vested.

Decision of Neville J. [1911] 2 Ch. 510, reversed.

Appeal from a decision of Neville J. (1)

Lord Nunburnholme by his will, dated September 8, 1906, after appointing executors and trustees of his will and making certain specific bequests and devises, and directing that in certain events the incomes due to his daughters under their marriage settlements should be made up by the persons interested under his will in his shares in Thomas Wilson, Sons & Co., Limited, proceeded as follows:

Clause 12. "I charge all my debts (except debts or charges for the time being secured by mortgage or otherwise on my said Warter estate and except also all such sum or sums of money as by any settlement or by this my will is or are or shall be charged upon or secured by my said Warter estate), and the estate duty which will be payable at my death in respect of my estate whether real or personal, upon the income and profits to arise from my shares in Thomas Wilson Sons & Co. Limited (but not upon the income arising from my debenture stock in that company) And I authorise my trustees either to pay my said debts or any of them and the said estate duty or any part thereof directly out of or by means of such income and profits or if such

(1) [1911] 2 Ch. 510.

C. A. 1912

NUNBURNHOLME (LORD), *In re.* WILSON *v.* NUNBURNHOLME.

method of payment shall in the opinion of my trustees be impracticable or inconvenient to recoup and make good such part of my estate whether residuary or otherwise as my trustees shall in their discretion expend in the first instance in the actual payment of my said debts (except as aforesaid) or any of them and of the said estate duty or any part thereof out of or by means of such income and profits And I direct that such recoupment and making good need not be made out of the said income and profits of any one year but may be spread over the said income and profits of such number of years as to my trustees in their absolute discretion may seem reasonable.

" 13. I bequeath all my shares in Thomas Wilson Sons & Co. Limited or any shares which may be substituted therefor (but not any debenture stock in the said company belonging to me) unto my trustees Upon trust to receive the income and profits arising therefrom and out of such income and profits to pay (if the occasion arises) such annual sums as I have hereinbefore directed shall be paid out of such income and profits in augmentation of the incomes of my said daughters Milicent Florence Eleanor Countess Cowley Edith Enid Countess of Chesterfield Joan Evelyn Jane Fairfax and Gwladys Alice Gertrude Chaplin and to pay my said debts (except as aforesaid) and the estate duty payable at my death in respect of my estate or to recoup and make good (in manner aforesaid) such part of my estate whether residuary or otherwise all such sums as shall have been in the first instance paid thereout in discharge of the said debts or of any of them or of the said duty or of any part thereof And subject as aforesaid to divide my said shares as nearly as may be into four equal parts And I declare that my trustees shall hold such four equal parts of such shares—"

The testator dealt with the first three fourth parts in a manner which it is not necessary to refer to and continued:

"(D) And as to the remaining one equal fourth part of my said shares Upon trust out of the income and profits arising therefrom (but subject as aforesaid) to pay to my said son Gerald Valerian Wilson an annual sum not exceeding three thousand pounds (if the said income and profits shall amount to so much) until he shall attain the age of twenty-six years and when and so soon as he shall

have attained the said age of twenty-six years my trustees shall hold such last mentioned one fourth part of my said shares and the accumulations of income arising therefrom but subject as aforesaid Upon trust for my said son Gerald Valerian Wilson absolutely. And I direct my trustees so long as they may by law accumulate to invest in their names in or upon some or one of the modes of investment hereinafter authorised the residue for the time being of the annual income and profits last aforesaid and the resulting income thereof so as to accumulate at compound interest."

And the testator devised and bequeathed the residue of his real and personal estate to his said trustees upon trust for sale and conversion and to invest the net residue of the proceeds of sale, and to stand possessed of such net residue and the income thereof upon trust for his wife for life and after her death upon trust for such of his children as his wife should by deed or will appoint, and in default of such appointment upon trusts for his children and grandchildren as therein mentioned.

The testator died in October, 1907.

Gerald Valerian Wilson died in September, 1908, aged twenty-three, a bachelor and intestate, and the testator's widow was his legal personal representative. On the death of Gerald Valerian Wilson the question arose whether he took an absolute vested interest on the death of the testator in the one fourth of the shares bequeathed in trust for his benefit in clause (D) or whether he took only a contingent interest therein so that on his death the same fell into the testator's residuary estate. The trustees took out a summons for the determination of this and other questions.

Neville J. held that, as the gift taken as a whole was intended solely for the benefit of Gerald, he took an absolute vested interest on the death of his father.

The Dowager Lady Nunburnholme appealed.

Astbury, K.C., and *W. Copping*, for the appellant. Whether the gift to Gerald is vested or contingent depends upon whether the whole interest in the shares is given to him: *Leake* v. *Robinson.* (1) It is clear on the construction of the will, and especially on clauses 11 and 12, which were not referred to in

(1) (1817) 2 Mer. 363, 386.

C. A. 1912

NUNBURNHOLME (LORD), *In re.* WILSON *v.* NUNBURNHOLME.

the Court below, that it was not, and that the shares were not in any way severed from the rest of the estate: Theobald on Wills, 7th ed. p. 585. In some cases a direction to apply income in maintenance is an indication that vesting was intended: *Fox* v. *Fox* (1), though that case was dissented from in *In re Wintle*. (2) But this appeal depends solely on the construction of the will.

[They were stopped by the Court.]

Peterson, K.C., and *Pepys*, for the testator's eldest son, who was interested in Gerald's estate as one of his next of kin. Under the will Gerald took an absolute vested interest in these shares. It must have been intended that if he should marry and leave children that interest would pass to them. The consequences can be looked at to shew that the intention of the testator was only postponement of enjoyment. We do not contend that the shares were severed from the rest of the estate in the same way as in *Saunders* v. *Vautier*. (3) Severance does not mean "handed over"; and there may be severance of property subject to a charge. The only object of this trust was Gerald himself, so there was a severance; and there is no gift over: *Vawdry* v. *Geddes* (4); *Ingram* v. *Suckling* (5); *Love* v. *L'Estrange* (6); *Greet* v. *Greet* (7); *Pearson* v. *Dolman*. (8)

Hon. E. C. Macnaghten, K.C., and *Dighton Pollock*, for a married daughter of the testator. These cases are governed by artificial rules which have been laid down with a view to ascertaining the intentions of testators. We submit that this gift is sufficiently severed and the prior claims on it are immaterial, and that Gerald took a vested interest in the property.

C. A. Bennett, for the trustees.

Horace Woodhouse, for another married daughter of the testator.

COZENS-HARDY M.R. This is an appeal from a decision of Neville J., who has held on the construction of the will of Lord Nunburnholme that his son Gerald, who died within twelve months after the testator without having attained the age of twenty-six, is entitled absolutely to an interest in one fourth of the shares,

(1) (1875) L. R. 19 Eq. 286.
(2) [1896] 2 Ch. 711.
(3) (1841) Cr. & Ph. 240.
(4) (1830) 1 Russ. & My. 203.
(5) (1859) 7 W. R. 386.
(6) (1727) 5 Bro. P. C. 59.
(7) (1842) 5 Beav. 123.
(8) (1866) L. R. 3 Eq. 315.

which I shall refer to, in Thomas Wilson, Sons & Co. The case was apparently argued before the learned judge on the assumption that there had been a severance of the specific bequest in question, and no attention was directed, either in argument or by the learned judge, to some clauses of the will which in my view throw a very strong light upon the construction which ought to be placed upon it. I observe that in the Court below Mr. Peterson said the gift was of a severed part. Mr. Jenkins did not dispute it. The reporter has not set out the earlier clauses of the will. Neville J. says (1): "In this case I think there is a severance. It seems to me there is no substantial distinction between a specific bequest to a trustee on trust as to one fourth for one person and as to the other three fourths for other three persons and a gift of one fourth of the property to trustees on trust for one of them. In either case there is a severance for the benefit of the cestui que trust." That may or may not be true. At present I do not feel disposed to dissent from it, but that is not the point of view from which the word "severance" is important in considering whether the gift which, prima facie, is contingent is made absolute.

Having made those remarks, let me come to the will itself. The testator was obviously a man of very great wealth, and he had very large interests in a company which owned the Wilson line of steamships. He had, as appears by a clause of the will, made provisions amounting to very large sums indeed on the marriage of his three daughters; he had settled debenture stock to the aggregate amount of 130,000*l.* or 140,000*l.*, and under those settlements each of his daughters would take the income during her life. Then it occurred to him that this debenture stock, which was 5 per cent. debenture stock, could be paid off by the company, and if so the income of his daughters would be reduced, and he then went on to provide by clause 11 that if at any time during the respective lives of his three daughters the debentures—reading it shortly—or any part of them should be paid off, then "the person or persons who shall at the time or respective times of such payment off be beneficially interested under the terms of this my will in the profits and income to arise

(1) [1911] 2 Ch. 515.

C. A 1912 — NUNBURNHOLME (LORD), *In re.* WILSON *v.* NUNBURNHOLME. — Cozens-Hardy M.R.

from my shares in the said company"—that means the ordinary shares—"shall contribute rateably in proportion to their several interests in such shares" towards making up his daughters' incomes. Then we come to clause 12, which again is a very unusual clause. He charged all his debts and the estate duty—there is an exception of certain debts, but that is of no importance—upon the income and profits to arise from the shares in the company but not upon the debenture stock. [His Lordship read clauses 12 and 13.]

The question is whether in the event, which happened, of Gerald dying at the age of twenty-three, his estate was absolutely entitled—whether he took in other words a vested and not merely a contingent interest. According to the ordinary prima facie meaning of the gift it is quite plain that it is a contingent interest, but there are many circumstances which the Court is bound to look at to see whether upon the construction of the will as a whole it can find sufficient indications that a gift which prima facie is contingent is in truth and in fact a vested gift. Now one of the most important things to consider is: is the gift severed entirely from the estate? In the present case it quite plainly is not. It has been frankly and fairly admitted by Mr. Peterson that the trustees have no power during the lives of the three daughters, or any one of them, to do anything except keep this entire block of shares in their own name, and as and when occasion may arise to apply the income of the aggregate block for the purposes required, and to the extent required to make up the deficiency of income of the daughters. It is not a case in which they can say the only person interested in this last fourth is Gerald, who is entitled to the 3000*l.* a year and to all accumulations of the income, and nobody else is interested in it at all. On that short ground it seems to me that the decision of the learned judge cannot stand. I am unable to say that there is any such severance here as is necessary to bring into operation the principles laid down in some of the authorities to which our attention has been called.

In the view which I take it is not perhaps necessary for me to consider whether if there had been a severance I should have taken the view which the learned judge has taken. As at present

advised, I should require rather more consideration before deciding that point. However, I do not decide either for or against the view which the learned judge took on the assumption which he undoubtedly was induced to make that there had been a full and effective severance within the meaning in which those words are used in the cases.

In my opinion the appeal succeeds, and it must be held that Gerald's interest was contingent, that his legal personal representative does not take any interest in it, and that it falls into the residue.

FLETCHER MOULTON L.J. I am of the same opinion. In this case the shares are left to the trustees not for the simple purpose of dividing them and holding them in trust for particular persons, but primarily for the execution of a trust which may be long continued and which requires them to apply the income of the shares in certain ways which cannot be foretold or provided for. What the deficiency of the income of the daughters will be depends upon future events, and therefore the trustees have to hold the whole of the shares in a block in order to be able to fulfil their very substantial duties of paying out of that income the estate duty, which must be very large on this property, and also providing, if and when occasion should arise, for the deficiency in the daughters' income. Therefore I think that this is a case in which there is neither in theory nor in substance anything like a severance. I am impressed in this respect by the fact that this is a limited charge upon income which might, under certain circumstances, justify and oblige the trustees to resort to the corpus. I look upon it as a case in which there is no possibility of a complete severance. The words of the legacy are admittedly in their ordinary meaning words which would carry only a contingent gift. Numerous cases have been cited in which in spite of that the Courts from other considerations arising out of the will itself have held that there was a vesting, but the only indicia that they relied upon seem to me to be absent here, and specially—and that is the one on which I base my judgment—the indicium of severance.

For these reasons I think the appeal must succeed.

C. A. 1912 — NUNBURNHOLME (LORD), *In re.* WILSON *v.* NUNBURNHOLME.

BUCKLEY L.J. Where by will a specific gift is made to trustees upon trust for A. when and so soon as he shall attain a named age, (words which prima facie import a contingency), the gift may nevertheless be vested under certain circumstances, as for instance in *Saunders* v. *Vautier* (1), if there be a gift of the accumulations of the income of the fund until he attains that age and there be no gift over. The reasoning by which that is arrived at is aptly expressed by Sir John Leach in *Vawdry* v. *Geddes* (2), where he says this: "Where interim interest is given, it is presumed that the testator meant an immediate gift, because, for the purpose of interest, the particular legacy is to be immediately separated from the bulk of the property." If the circumstances are such that the gift is to be immediately separated from the rest of the property, and the income is at once given to the beneficiary or the income is to be accumulated for the benefit of the beneficiary, and when and so soon as he attains the named age the corpus is given him and the accumulations are given him, then the Court ceases to regard the gift as a contingent gift and holds it to be a vested gift.

The question in this case is whether the conditions under which those inferences are drawn are here satisfied. In my opinion there is no ground for drawing those inferences. The trusts here are these. A large block of shares is given to trustees and the first trust is out of the income and profits of the shares to supplement if necessary the incomes of three daughters under circumstances which I need not repeat. The next is to pay out of the income the testator's debts and the estate duty payable on his death in respect of his estate. When those purposes have been satisfied then the trustees are to divide the shares into four equal parts, and the particular beneficiary here in question is provided for by clause (D), which declares or provides that as to that fourth those shares shall be held upon trust out of the income and profits to pay Gerald an annual sum not exceeding 3000*l.* if they amount to so much until he attains twenty-six, and when and so soon as he attains twenty-six to hold that fourth of the shares and the accumulations for him. I ask myself where are the shares separated

(1) Cr. & Ph. 240. (2) 1 Russ. & My. 208.

from the rest of the estate? They are necessarily to be held by the trustees as to the entirety of them, first to satisfy the claims of the three daughters if those claims arise, or, as the testator calls it, "if the occasion arises," and then they are to be held for the general purposes of his estate in the sense that their income is to go to pay his debts and to pay his estate duty. It is only when all those purposes have been satisfied that they are to be divided into fourths, and Gerald is to have the interest which is provided for him in his one-fourth. Separation, for the purpose of that which we are here considering, in my opinion means that the trustees will properly as matter of bookkeeping or physically set apart those shares as being shares to which no one but the beneficiary has any right to look, subject of course (if necessary) to the right to resort to them to satisfy the testator's debts. They must be so dealt with that under the testator's dispositions the trustees may set them apart and say, "These shares and the fruit of these shares belong to A. B. and nobody else." In that case there has been a complete separation from the estate. That fails altogether as regards these shares. There is no separation from the general estate until events shall have happened which, as regards his debts and estate duty, would not probably happen for some years, and as regards the first right of the three daughters could not happen until the death of the last survivor of them. Therefore there was no separation from the estate, and there being no separation from the estate it is not necessary to go on and consider whether the gift was a gift of the whole income or a part of the income for the purpose of the matter which the learned judge discussed in his judgment. That question does not arise. I hold here that there is no separation, and the result is that the shares did not vest in Gerald, who died under twenty-six; his legal personal representatives do not take; and this appeal must be allowed.

Solicitors: *Woodhouse & Davidson; Collyer-Bristow & Co.; R. S. Taylor, Son & Humbert.*

H. C. R.

EVE J.

1912

Jan. 25, 26, 30.

In re PINK.

PINK *v.* PINK.

[1911 P. 2201.]

Debt—Release—Cancellation—Will—Construction—Deduction of Debts from Settled Legacies—Advances by Testator—Entries in Testator's Ledger—Continuing Intention—Appointment of Debtor as Executor.

A testator during his life made advances of 5800*l.* and 9800*l.* to his two sons-in-law, R. and M., respectively. In February, 1908, R. was adjudicated bankrupt, with assets nil, and he had not obtained his discharge. In the testator's ledger at the foot of R.'s account was an undated entry "This debt is cancelled as altogether bad, debtor being bankrupt." With respect to M.'s debt there was an entry in the ledger in 1905 that 5000*l.* had been given off the debt for an object arranged with the wife of M., and in June, 1909, there was a further entry "This debt is absolutely cancelled from this date, viz. 4800*l.* and interest. Edward Pink." No interest was ever paid by R.

By his will, made in March, 1908, the testator appointed M. to be one of his executors, and settled a sum of 20,000*l.* and one fourth of his residue upon each of the wives of R. and M. and their children, and he directed that the debt of R. should not be called in for five years if interest was paid, but if not, or in the event of the bankruptcy of R., the whole principal and interest should immediately become payable. In the case of M. the testator directed that if the wife of M. should die within seven years of his death any sum due from M. should be absolutely extinguished, and he declared that any loss sustained in respect of any indebtedness of either R. or M. should be credited as a loss to the trust legacy of 20,000*l.* to the wife of the debtor, and not as a loss to his residuary estate.

Upon a summons by the legal personal representatives of the testator to have it determined whether these debts were still due :—

Held, (1.) that as to the debt of R. the memorandum in the ledger could not operate as a release, nor had the bankruptcy of R. put an end to his indebtedness.

Cherry v. *Boultbee* (1839) 4 My. & Cr. 442, explained.

(2.) That as to the debt of M. there was not sufficient evidence of an intention by the testator to make a gift, but even if there were such an intention, or an imperfect gift, it was not perfected by the appointment of M. as executor, and the case did not come within *Strong* v. *Bird* (1874) L. R. 18 Eq. 315.

Held, accordingly, that neither of the debts had been released or cancelled, but both were still due. The whole of the indebtedness of R.

must be treated by the executors as a loss, and deducted from the settled legacy to his wife; and if any loss eventually arose in respect of the debt of M., such loss would fall upon the settled legacy to his wife.

EVE J.
1912
PINK, *In re.*
PINK *v.* PINK.

ADJOURNED SUMMONS.

By his will, dated March 12, 1908, the testator, Edward Pink, appointed the defendant Sir Thomas Pink, and his son-in-law the defendant Arthur Moore, and the two plaintiffs, Harold Rufus Pink and Leonard Montague Pink, executors and trustees thereof, and, after making certain specific devises and bequests and giving certain legacies, he devised and bequeathed all the residue of his real and personal estate to his trustees upon trust for sale and conversion, and, after payment of debts, to set apart and appropriate three several sums of 20,000*l.* for his two daughters Caroline Rayner and Emily Moore, and for the children of his deceased daughter, Laura Warland, such sums, together with three one fourth parts of his residuary estate, to be held by his trustees upon trust for the benefit of his two daughters and their families and the children of the deceased daughter as therein declared; and the testator directed that any sum of money that might at his death be due to him from his son-in-law E. H. Rayner should not be called in by his trustees for a period of five years from the date of his death, provided that interest at the rate of 4 per cent. per annum should be punctually paid; but in case interest should not be so paid, or in case of the bankruptcy of his said son-in-law, the whole amount of principal and interest should, in such case, immediately become payable. And the testator further declared that any sum of money that might be due from his son-in-law Arthur Moore should, if his daughter Emily Moore should have predeceased the testator, or should die within seven years after his death, be absolutely extinguished, and to the intent that, should Emily Moore survive him, his trustees should have no claim to the amount so owing until the expiration of seven years from the date of his decease, in which case the trustees might, during the eighth and each succeeding year after his decease, require payment of the amount owing by instalments, not exceeding 250*l.* a year, with interest at 4 per cent. per annum; and the testator declared that any loss that might be sustained in

EVE J.
1912
PINK, *In re.* PINK *v.* PINK.

respect of any such indebtedness, whether of the said E. H. Rayner or of the said A. Moore, should be treated as a loss to the trust legacy of 20,000*l.* thereby bequeathed to the wife of the debtor, and not as a loss to his residuary estate.

The testator died on July 19, 1910, and his will and two codicils thereto were proved by all the executors named in the will. The testator had from time to time during his lifetime advanced various sums of money to his two sons-in-law, the account of such sums being kept by the testator in a ledger in his own handwriting. From this it appeared that up to 1909 there had been advanced to E. H. Rayner 5800*l.*, and to A. Moore 9800*l.* No part of such sums had been repaid to the testator or to his executors, nor had any security been given for the advances. No interest had been paid by E. H. Rayner. In the ledger there appeared an undated entry in the testator's handwriting, at the foot of the ledger account of E. H. Rayner (the last entry in which was dated July 12, 1892), as follows: "This debt is cancelled as altogether bad, debtor being bankrupt. E. Pink." In relation to the account in the ledger against A. Moore there was an entry at the foot of the account (the last entry in which was July 5, 1905), as follows: "5000*l.* is given off this debt for a definite object arranged between me and Mrs. Moore as from July 3, 1906, with interest due to that date"; and on June 2, 1909, there was this entry: "This debt is absolutely cancelled from this date, viz, 4800*l.* and interest. Edward Pink."

E. H. Rayner was adjudicated a bankrupt on February 10, 1908; his assets were nil, and he had never obtained his discharge. The testator made no proof in the bankruptcy for his debt.

There were no children of Arthur Moore and his wife. The fact of the two entries being made in the ledger was communicated by the testator to Mrs. Moore alone.

On October 26, 1911, an originating summons was taken out by Harold Rufus Pink and Leonard Montague Pink for the determination of the questions (1.) whether the debts in respect of sums of money from time to time advanced by the testator in his lifetime to the defendants Arthur Moore and Edward Howard Rayner, his two sons-in-law, respectively, and amounting in the aggregate to 9800*l.* and 5800*l.* respectively, had, by virtue of the entries in

the testator's ledger, been legally and effectually released and cancelled by him in his lifetime, or whether such sums or any part thereof were due and owing to the testator at his death. (2.) If the sums advanced to E. H. Rayner remained due and owing to the testator at his death, whether the executors and trustees of the testator's will ought to take any steps to recover the same, or should, by reason of the bankruptcy of E. H. Rayner, deduct the moneys so due and owing from him from the legacy of 20,000*l.* bequeathed by the testator in trust for his daughter, the defendant Caroline Rayner, and her issue. The defendants to the action were Sir Thomas Pink, one of the executors and trustees of the will and a residuary legatee of the remaining one fourth of the residue; Arthur Moore and his wife, who was also a pecuniary legatee under the will; Caroline Rayner and her five children, all pecuniary and residuary legatees; and Laura Mary Warland and two others, the three infant children of the deceased daughter of the testator, and also pecuniary and residuary legatees.

Bradley Dyne, for the executors and trustees.

C. J. W. Farwell, for a beneficiary.

Jessel, K.C., and *H. T. Method*, for Mr. and Mrs. Moore. A debt may be forgiven to a debtor who is not an executor by a release which is not formal: *Gilbert* v. *Wetherell*. (1) If the Court is satisfied on evidence that the testator intended to forgive, the intention should be given effect to. A release under seal is not necessary; and, if that is not necessary, nothing can be more effectual than an entry in a ledger to which the executors would naturally refer after the testator's death to find out what the state of his affairs was.

But in any case the debt is gone at law by the appointment of A. Moore as executor, and that principle applies where the executor is one of several. *Strong* v. *Bird* (2) is absolutely applicable, and was followed in *In re Applebee* (3) and *In re Stewart*. (4) In the present case the forgiveness is in the testator's own hand, and was a continuing forgiveness up to his death.

(1) (1825) 2 S. & S. 254.
(2) L. R. 18 Eq. 315.
(3) [1891] 3 Ch. 422.
(4) [1908] 2 Ch. 251.

EVE J.
1912
PINK, *In re.* PINK *v.* PINK.

Clayton, K.C., and *Owen Thompson*, for Mrs. Rayner and her infant children.

The release to Moore was a nudum pactum, and though his being appointed an executor constitutes a release at law, yet in equity there must be evidence of continuing forgiveness down to the time of the death. That is not shewn here. Mr. Rayner's case stands on a different footing from that of Mr. Moore. Mrs. Rayner and her children were not indebted. As against them, the executors cannot retain any part of the legacy.

There being a bankruptcy, the debt was not due from the debtor and he could give no mortgage for it. All that the testator can do is to prove in the bankruptcy. Sect. 9 of the Bankruptcy Act, 1883, not only suspends the creditor's remedy, but destroys his claim.

The words in the will "in case of the bankruptcy of my son-in-law" must refer to bankruptcy after the death, and cannot refer to a present bankruptcy then in existence; but it does not matter whether the bankruptcy was before or after. In the present case the bankruptcy had in fact happened and was known to the testator. If that be right, then the stipulation which fixes the loss upon the 20,000*l.* does not apply at all. The principle of *Cherry* v. *Boultbee* (1), *In re Hodgson* (2), and *In re Orpen* (3) applies. The right of the person entitled to receive the debt is a right simply to receive a dividend. The executors have no right to receive more than a dividend, which was all that the testator himself could receive. But we submit that there was, in fact, a present abandonment of the debt by the testator amounting to an equitable release: *Eden* v. *Smyth* (4); *Flower* v. *Marten* (5); *Peace* v. *Hains*. (6)

In the case of *Cross* v. *Sprigg* (7), which may be relied upon by the other side, there were mere voluntary declarations which were no evidence of a release at law and did not constitute a release in equity. The principle of the cases is that the Court is entitled to look at the intention of the testator to release a debt,

(1) 4 My. & Cr. 442.
(2) (1878) 9 Ch. D. 673.
(3) (1880) 16 Ch. D. 202.
(4) (1800) 5 Ves. 341.
(5) (1837) 2 My. & Cr. 459.
(6) (1853) 11 Hare, 151.
(7) (1849) 6 Hare, 552.

such intention being gathered from parol statements or writing, or conduct.

P. O. Lawrence, K.C., and *J. S. Green*, for the infant children of the deceased daughter. As to the indebtedness of Mr. Moore the declarations in the testator's ledger are not admissible. There was no effective cancellation of the debt: *In re Hyslop.* (1) There was no irrevocable gift intended. This case does not therefore come within the principle laid down in *Strong* v. *Bird* (2), *In re Applebee* (3), and *In re Stewart* (4), as the appointment of Mr. Moore as executor could not perfect the gift.

In the case of *In re Griffin* (5) there was held to have been a completed gift by the indorsement and delivery of a banker's deposit receipt with the intention to make a gift.

As to Mr. Rayner's case the debt is not gone, but the remedy cannot be enforced without the leave of the Court: Bankruptcy Act, 1883, s. 9.

The debt is provable in bankruptcy. The case of *Cherry* v. *Boultbee* (6) is no authority for saying that the debt came to an end on the bankruptcy.

Jessel, K.C., in reply.

EVE J. By this summons the plaintiffs, as two of the executors of the will and codicils of the late Mr. Edward Pink, seek the assistance of the Court in determining the true state of account between the testator's estate on the one hand and two of his sons-in-law, Mr. Arthur Moore and Mr. Edward Howard Rayner, and their respective wives and families, on the other hand.

The testator died on July 19, 1910. During his lifetime he had made large advances to both sons-in-law, and the substantial question which I have to determine is whether, having regard to certain memoranda made by the testator in his private ledger, to the terms of his will, and to other events which I will mention by-and-by, there was, at the time of the testator's death, any indebtedness of either son-in-law which ought to be set off

(1) [1894] 3 Ch. 522.
(2) L. R. 18 Eq. 315.
(3) [1891] 3 Ch. 422.
(4) [1908] 2 Ch. 251.
(5) [1899] 1 Ch. 408.
(6) 4 My. & Cr. 442.

EVE J.
1912
PINK, *In re.* PINK *v.* PINK.

against, or deducted from, settled legacies bequeathed for the benefit of their respective wives and families. The facts of the two cases are altogether dissimilar, and it is, therefore, necessary that I should deal with them separately.

I will take first the case of Mr. Rayner. It appears from the testator's ledger that between the month of September, 1887, and the month of January, 1892, he advanced to Mr. Rayner sums of money amounting in the whole to 5800*l.* Nothing was ever repaid in respect of those advances, nor was any security given therefor, or any interest paid thereon, and on February 10, 1908, Mr. Rayner was adjudicated a bankrupt. No dividend has ever been paid in the bankruptcy and the debtor still remains undischarged. At the foot of Mr. Rayner's account on folio 50 of his ledger the testator has written and signed the following memorandum: "This debt is cancelled as altogether bad, debtor being bankrupt. E. Pink." It is undated, but must of course have been written at some date subsequent to February 10, 1908. By his will dated in the next month, March 12, 1908, the testator settled a sum of 20,000*l.* and one fourth of his residue upon trust for his daughter, the wife of Mr. Edward Howard Rayner, and her children, and directed that any sum of money that might, at his death, be due to him from his son-in-law, Edward Howard Rayner, should not be called in by his trustees for a period of five years from the date of his death, provided that interest at the rate of 4*l.* per cent. per annum, or at such other rate as might be secured to him by any mortgage or charge, should be punctually paid to his trustees by such son-in-law, but in case interest should not be so paid, or in case of the bankruptcy of his said son-in-law,—I agree that that was probably referring to a future bankruptcy—the whole amount of principal and interest should, in such case, immediately become payable; and he declared that any loss that might be sustained in respect of such indebtedness of the said Edward Howard Rayner should be treated as a loss to the trust legacy of 20,000*l.* thereby bequeathed to the wife of the debtor, and not as a loss to his residuary estate. Mr. Rayner not being in a position to comply with the condition as to paying interest on the indebtedness, some of the residuary legatees argue that the 5800*l.* is now

immediately payable and that any loss which may arise in respect thereof ought to be deducted from Mrs. Rayner's settled legacy. I do not see what answer there is to this contention.

The memorandum in the ledger cannot operate as a release; it is a record of unpalatable but solid facts, a kind of poignant epitaph to be found inscribed on the folios of many a parental ledger. Nor do I think that there is any substance in the argument that the bankruptcy of the son-in-law put an end to his indebtedness. So long as he remains undischarged he is not released from his debts, although the right of the creditor to enforce payment by process is suspended. I do not accept the view that *Cherry* v. *Boultbee* (1) and the cases in which it has been followed proceed upon the footing that the liability of the legatee to pay the debt came to an end on his bankruptcy, and that it was the extinguishment of this liability which enabled him to insist upon payment of the legacy in full. The true ground of those decisions is that the legacy vested in the legatee as agent for his assignee in bankruptcy, and, as against his principal, those accountable for the legacy could only retain thereout the payments for which the principal was liable, that is to say, the dividends distributable in the administration of the bankrupt legatee's estate. These cases, therefore, do not, in my opinion, afford any authority for the proposition that the indebtedness is put an end to by the bankruptcy. I think in Mr. Rayner's case, having regard to all the circumstances and the fact that this is a bankruptcy which began in 1908, and in which, according to the evidence, there has never been one penny of assets, the trustees ought to treat the whole of the indebtedness as a loss to be deducted from Mrs. Rayner's settled legacy. If, hereafter, funds are forthcoming to mitigate this loss, such funds will be applicable to recouping the legacy until, as may happen, it is made up again to its full amount.

In Mr. Moore's case the advances commenced in 1893; there were several repayments and then subsequent advances, and in February, 1907, his indebtedness to the testator amounted to 6550*l.*, and at this stage, but at what date does not appear, the testator made the following entry on the credit side of the ledger:

(1) 4 My. & Cr. 442.

EVE J.
1912
PINK, *In re.* PINK *v.* PINK.

"5000*l.* is given off this debt for a definite object arranged between me and Mrs. Moore as from July 3, 1906, with interest due to that date," and on the debit side he deducted the 5000*l.* "per contra," carrying forward 1550*l.* as the balance of indebtedness remaining outstanding. The memorandum itself is very difficult to interpret. It would seem to imply that the debtor was to employ 5000*l.* for a definite object, and on the footing of his so doing the debt was to be written down by that amount; but this construction is negatived by the evidence contained in the affidavit made by Mrs. Moore, from which it would appear that the writing off of the 5000*l.* from this debt was an alternative to another proposal altogether whereby the testator contemplated giving her 5000*l.* for particular purposes which (I have no doubt for good and sufficient reasons) she has not disclosed. Moreover, the testator never communicated the purport of this entry to the debtor, nor, as I understand it, does the debtor suggest that he is under any obligation as to the application of the 5000*l.* In these circumstances, I think it would be very difficult to treat the entry as proving an intention on the part of the testator to give the 5000*l.* to Mr. Moore by releasing him to that extent from his indebtedness. After February, 1907, further advances were made, and when the testator made his will in March, 1908, the indebtedness in respect of the 1550*l.* brought forward from February, 1907, and the new advances, amounted to 4200*l.* The testator appointed Mr. Moore to be one of his executors, and after the date of his will made him further advances of 600*l.*, bringing up the indebtedness on capital account to 4800*l.*

On June 2, 1909, the testator wrote and signed a memorandum on the credit side of Mr. Moore's account in these words: "1909, June 2. This debt is absolutely cancelled from this date, viz. 4800*l.* and interest. Edward Pink."

By his will, as in the case of Mrs. Rayner, the testator settled a sum of 20,000*l.* and one fourth of his residue upon trust for the benefit of Mrs. Moore and her children, and directed that any sum of money that might at his death be due to him from his son-in-law, Arthur Moore, should, if his said daughter Emily Moore should have predeceased him, or should die within seven years after his death, be absolutely extinguished, and to the

intent that, should the said Emily Moore survive him, his trustees should have no claim to the amount so owing as aforesaid until the expiration of seven years from the date of his decease, and then only in the event of the said Emily Moore being still alive, "in which case," the testator added, "my trustees may, during the eighth and each subsequent year after my decease, require payment of the sum owing by instalments not exceeding 250*l.* a year and interest from time to time at the rate of 4 per cent. per annum"; and he declared that any loss that might be sustained in respect of any such indebtedness of the said Arthur Moore should be treated as a loss to the trust legacy of 20,000*l.* thereby bequeathed to the wife of the debtor, and not as a loss to his residuary estate. The testator made two codicils dated respectively June 23 and December 14, 1909. By the first of these he gave Mr. Moore a life interest in a moiety of the 20,000*l.* settled legacy in the event of Mrs. Moore dying in her husband's lifetime without surviving issue, and confirmed his will; and by the second, after some dispositions to which I need not further refer, he confirmed his will and first codicil.

On behalf of Mr. Moore it is argued that the entries in the ledger and the communication to Mrs. Moore by the testator of the fact that he had made the second entry prove an intention on the part of the testator to release the debt; that the appointment of Mr. Moore as executor releases the debt at law; and that, in the absence of evidence to the contrary, this Court will infer a continuing intention to release and following the law will treat the release as perfected, and the debt as irrecoverable in equity. In support of this contention the cases of *Strong* v. *Bird* (1), *In re Applebee* (2), and *In re Stewart* (3) are relied upon, and it is said that the direction in the will as to any sum of money that might be due from Mr. Moore to the testator at the time of his death is directed, not to any portion of the 9800*l.* indebtedness, but to any debt which might have arisen between Mr. Moore and the testator subsequent to the date of the entry cancelling the other debt. As already indicated, I do not feel justified in treating the entry in relation to the 5000*l.* as evidence

(1) L. R. 18 Eq. 315. (2) [1891] 3 Ch. 422.
(3) [1908] 2 Ch. 251.

EVE J.
1912
PINK, *In re.* PINK *v.* PINK.

proving an intention to give. I think it is quite impossible to say what it proves, and I cannot hold this transaction to be an imperfect gift perfected by the appointment of the donee as executor. As regards the 4800*l.*, although I am not prepared, as at present advised, to hold that in order to constitute a valid gift it is necessary to communicate the act of donation to the donee, I think the evidence of the gift in this case is very slight, and I doubt, even in the absence of the direction in the will, whether I should be justified in holding that there was in fact a gift intended.

But even if there were, I do not think the case in respect of the 4800*l.* is brought within the rule laid down in *Strong* v. *Bird* (1) and applied in *In re Applebee* (2) and in *In re Stewart.* (3) In the case of *Strong* v. *Bird* (1) the late Sir George Jessel, in stating the rule, says this: "First of all, we must consider what the law requires. The law requires nothing more than this, that in a case where the thing which is the subject of donation is transferable or releasable at law, the legal transfer or release shall take place. The gift is not perfect until what has been generally called a change of the property at law has taken place. Allowing that rule to operate to its full extent, what occurred was this. The donor, or the alleged donor, had made her will, and by that will had appointed Mr. Bird, the alleged donee, executor. After her death he proved the will, and the legal effect of that was to release the debt in law, and therefore the condition which is required, namely, that the release shall be perfect at law, was complied with by the testatrix making him executor." Down to that point assuming (and for the purposes of this argument I will assume) that there is proved an intention to give, or an attempt to give on June 2, 1909, all that I have read applies to this case as it did to the case of Mr. Bird in *Strong* v. *Bird.* (1) The Master of the Rolls goes on: "It is not necessary that the legal change shall knowingly be made by the donor with a view to carry out the gift." That is equally applicable to this case. "It may be made for another purpose." Then he goes on: "But if the gift is clear, and there is to be

(1) L. R. 18 Eq. 315, 318. (2) [1891] 3 Ch. 422.
(3) [1908] 2 Ch. 251.

no recall of the gift, and no intention to recall it, so that the person who executes the legal instrument does not intend to invest the person taking upon himself the legal ownership with any other character, there is no reason why the legal instrument should not have its legal effect."

From that judgment I gather that what you have to find first is a clear gift or attempt to give: then you have to be satisfied that in the appointment of the donee as executor the testator had not any intention inconsistent with an intention to bring about the result flowing from the appointment, and thereby to perfect the gift.

Assuming in the present case that there is evidence of an intention to give or of an imperfect gift, can I read the testator's will and come to the conclusion that the intention was a continuing one and that he intended to perfect the gift by appointing Mr. Moore an executor? I do not think I can. By the same instrument by which he appoints Mr. Moore executor the testator directs what is to be done in respect of any sum which may be due from Mr. Moore at the time of his death. This sum of 9800*l.* was due in equity. The testator makes a provision to the relief of Mr. Moore: he does not, as in the case of Mr. Rayner, make it a condition of the money not being called in that interest shall be paid in the meantime, but, on the contrary, he inserts in his will provisions which, in certain events, will operate to release Mr. Moore entirely from his indebtedness, and even if the debt should ultimately become payable by Mr. Moore, he inserts provisions which spread the obligation to repay over a great number of years. I think that there are no grounds here on which I ought to conclude that this was an attempted gift which the testator perfected by the appointment of Mr. Moore as executor, and accordingly I hold that in this case also the trustees must administer the estate on the footing that the 9800*l.* and interest thereon at 4 per cent. per annum from July 5, 1905, may become repayable by Mr. Moore in certain events, and that if it become repayable and there be a loss resulting from the whole or partial non-payment, the amount of that loss must fall upon the legacy settled upon Mrs. Moore.

In conclusion I ought perhaps to add that I have not dealt

EVE J.
1912
PINK, *In re.* PINK *v.* PINK.

at length with the argument addressed to me founded on the authority of such cases as *Eden* v. *Smyth* (1), *Aston* v. *Pye* (2), *Gilbert* v. *Wetherell* (3), and *Flower* v. *Marten* (4), because, in my opinion, the applicability of those cases to this case is effectively disposed of by the judgment in *Cross* v. *Sprigg*. (5) I think, on the whole, the costs of all parties may be taxed as between solicitor and client and paid out of the residue.

Solicitors: *Hicklin, Washington & Pasmore; Beard & Sons; Arthur Tyler.*

G. M.

JOYCE J.
1912
Jan. 12, 22.

In re HAYGARTH.
WICKHAM *v.* HOLMES.

[1911 H. 3186.]

Will — Remoteness — Limitations after Estate Tail — Legal and Beneficial Interests—Periods of Ascertainment—Determination of Estate Tail—Life in being at Testator's Death and Twenty-one Years after—Contingency of attaining the Age of Twenty-one Years—Validity.

The testator devised his real estate unto and to the use of his trustees and their heirs upon trust to pay the net rents and profits to his brother during his life and after his death to stand seised of his real estates upon trust for the first and other sons of his brother successively in tail with remainder upon trust for the first and other daughters of his brother successively in tail, and if the trusts for his brother for life and for his issue in tail should fail or determine then the testator directed his trustees on such failure or determination to sell his real estate and hold the net proceeds of sale thereof upon trust for such of the testator's five cousins, naming them, as should be living when the said direction for sale should come into operation (each share to be retained upon the usual trusts of a settled share for such cousin for life and after his or her death for his or her children), provided always that if any of his said five cousins should die before the aforesaid direction for sale should come into operation leaving a child or children living when such direction should come into operation who being male should attain twenty-one, or being female should attain twenty-one or marry, then and in every such case the last-mentioned child or children should take, and if more than one equally between them, the share to which his, her, or

(1) 5 Ves. 341.
(2) (1788) 5 Ves. 350, 354.
(3) 2 S. & S. 254.
(4) 2 My. & Cr. 459.
(5) 6 Hare, 552.

their parent would have been entitled for life if such parent had not died before the direction for sale had come into operation.

The testator died in 1902. His brother died without issue in 1911. Three out of the five cousins had died before the brother's death, one of them leaving a child still an infant. On a summons to determine whether the above trusts were void for remoteness:—

Held, that inasmuch as all the persons to take and the shares in which they were to take must necessarily be ascertained, if not at or before the determination of the estates tail, at any rate within a life in being at the testator's death and twenty-one years after, the trusts of the proceeds of sale subsequent to the determination of the estates tail did not offend against the rule against perpetuities, and were valid.

The statement of the law by James L.J. in *Heasman* v. *Pearse* (1871) L. R. 7 Ch. 275, 282, 283, applied and supplemented.

ADJOURNED SUMMONS.

By his will the testator, the Reverend Henry William Haygarth, appointed the plaintiffs executors and trustees and devised certain real estate, therein called his family estate, unto and to the use of his trustees and their heirs upon trust to raise certain sums of money in manner therein mentioned and subject thereto to stand seised of his family estate upon trust during the life of his brother Francis Haygarth to collect and receive the rents and profits thereof and pay thereout the interest on any mortgages affecting the same and to manage his family estate with all the powers in that behalf of absolute owners, and upon further trust to pay the net rents and profits of his family estate to his brother Francis Haygarth and his assigns during his life and from and after his death to stand seised of his family estate upon trust for the first and other sons of the said Francis Haygarth successively in tail so that every elder son and his issue should be always preferred to any younger son and his issue, with remainder upon trust for the first and other daughters of the said Francis Haygarth successively in tail so that every elder daughter and her issue should be always preferred to every younger daughter and her issue And if the trusts thereby declared in favour of his brother Francis Haygarth and his assigns during his life and for his issue in tail should fail or determine, then the testator directed his trustees on the failure or determination of such estates to sell his family estate and to stand possessed of the net proceeds thereof upon trust to pay

JOYCE J. 1912 HAYGARTH, *In re.* WICKHAM *v.* HOLMES.

thereout certain sums in the will mentioned and subject thereto in trust for such of his five cousins Frederika Ponsonby Holmes, Henry Barkley Holmes, Arthur Light Holmes, Georgina Elizabeth Whelpton, and Katharine Aimée Swayne, all children of Sir William Holmes, as should be living when the said direction for sale should come into operation, and if more than one to be divided between them in equal shares, but so that if Frederika Ponsonby Holmes, Georgina Elizabeth Whelpton, and Katharine Aimée Swayne or any of them should then be living or should have previously died leaving issue then living certain sums thereinbefore directed to be set apart for their benefit should be brought into hotchpot, and the testator directed his trustees to retain the share of each of his five cousins who should become entitled to participate in the net proceeds of his family estate upon the trusts therein mentioned, which, stated shortly, were as follows:—

Upon trust to invest the same and pay the income thereof to such cousin for his or her life with power to appoint a life or shorter interest to a surviving spouse and subject thereto in trust both as to capital and income for the children or remoter issue of such cousin as he or she should by deed or will appoint, and in default of and subject to any such appointment in trust for all the children of the same cousin who should be living when the said direction for sale should come into operation and who being male should attain the age of twenty-one years or being female attain that age or marry, and if there should be only one such child then the whole to be in trust for that one child, with the usual hotchpot clause, and in case there should be no such children or child of such cousin then in trust for such cousin's appointees, and in default of and subject to any such appointment in trust for the other of his said five cousins living at the time when the direction for sale of his family estate should come into operation in equal shares and so that such accruing shares should be subject to the trusts thereby declared concerning the original share of the same cousin.

The testator then provided as follows: "Provided always and I hereby declare that if any of my said five cousins shall die before the aforesaid direction for sale of my family estate shall

come into operation leaving a child or children living at the time when such direction shall come into operation who being male shall attain or shall have attained the age of twenty-one years or being female shall attain or shall have attained that age or shall marry or shall have married then and in every such case the last mentioned child or children shall take and if more than one equally between them the share to which his her or their parent would have been entitled for life of and in the net proceeds of sale of my family estate if such parent had not died before the direction for sale thereof had come into operation including any share or shares which would have accrued to such parent under the trust and provision in that behalf hereinbefore contained."

The testator gave all his real and personal estate not thereby otherwise disposed of to his trustees upon trust for sale and conversion and after payment of debts, funeral and testamentary expenses, legacies and duties, and investment of the residue of such proceeds to stand possessed as to one moiety of such residuary trust moneys and investments in trust for such of the children of his late cousin the Reverend John Sayer Haygarth and Eleanor his wife as should be living at his decease, if more than one in equal shares, and as to the other moiety in trust to pay the income thereof to the defendant Anna Constance Blacker during her life and from and after her death in trust for her children as therein mentioned.

The testator died on December 31, 1902, and his will was proved by the plaintiffs.

Francis Haygarth died on April 18, 1911. His only child had died in infancy many years before, and on Francis Haygarth's death the direction for sale of the testator's family estate came into operation.

Two only of the testator's five cousins named in his will were living at Francis Haygarth's death, namely, the defendants Frederika Ponsonby Holmes and Georgina Elizabeth Whelpton.

Henry Barkley Holmes had died on January 26, 1910, without ever having had any child.

Arthur Light Holmes had died on March 11, 1902, a bachelor.

JOYCE J. 1912 — HAYGARTH, *In re.* WICKHAM *v.* HOLMES.

Katharine Aimée Swayne died on January 2, 1905, having had one child only, the infant defendant Helen Mary Swayne.

The defendant Irene Constance Whelpton and the infant defendants H. E. Whelpton and G. E. Whelpton were the three children of the defendant Georgina Elizabeth Whelpton living at the death of Francis Haygarth.

The defendants W. F. Blacker, N. V. Blacker, and C. F. Blacker and the infant defendant T. D. Blacker were the four children of the defendant Anna Constance Blacker.

The defendant Edward Brownlow Haygarth was one of the seven children of John Sayer Haygarth and Eleanor his wife.

The plaintiffs took out this summons for the determination (inter alia) of the question whether the trust of the share of any of the testator's cousins who should die before the direction for sale came into operation leaving a child or children living at the time when such direction for sale should come into operation who being male should attain or have attained twenty-one, or being female should attain or have attained that age or should marry or have married, for such last-mentioned child or children was valid, or whether the same was void for remoteness.

Brabant, for the plaintiffs.

T. H. Carson, K.C., and *Harman*, for the defendant Frederika P. Holmes. The only persons who can take under the proviso are the children who attain twenty-one of persons living at the testator's death. At least the maximum number of persons to take under this gift must be ascertained within a life in being and twenty-one years from the testator's death, and although in the events which have happened the minimum number of shares can also be ascertained within the same limit, yet under the gift it might have happened that the minimum number could not have been so ascertained because it is possible that the trust for sale arising on the expiration of the estates tail might not come into operation, say, for 100 years after the testator's death, and so one has to consider what is the effect of a limitation of this kind when it comes after the limitation of an estate tail. We submit that the fact that this proviso follows the determination of an estate tail makes no difference. No limitation after an estate

tail is too remote, if at the moment of the determination of the estate tail the legal and beneficial interests shall be both ascertainable, the reason being that the estates tail are barrable. The law is stated by James L.J. in *Heasman* v. *Pearse* (1) as follows: "No limitation after estates tail is, as the Vice-Chancellor himself points out, too remote; and it appears to us clear that, whether the limitation be directly to a class of issue to be ascertained at the determination of the estate tail, or a gift to a trustee for such class, or upon trust to convey to such class, or to sell and to divide the produce amongst such class, is wholly immaterial, if the legal and beneficial interests should be both ascertainable at the moment of the determination of the estate tail."

Here both the legal and beneficial interests are ascertainable the moment the estates tail determine and the direction for sale comes into operation, and then the minimum number of shares can be fixed. This is really an original, not a substitutional, gift: per Kindersley V.-C. in *Lanphier* v. *Buck.* (2)

[JOYCE J. It is really an original gift to a composite class.]

Yes; and taking it as an original gift, then the maximum and minimum limits are fixed according to the requirements stated by Lord Selborne in *Pearks* v. *Moseley* (3) when the direction for sale comes into operation.

To make James L.J.'s statement in *Heasman* v. *Pearse* (1) a complete statement of the law one must add after the words "if the legal and beneficial interests should be both ascertainable at the moment of the determination of the estate tail" the words "or within a life in being and twenty-one years after the death of the testator." So that, even on the assumption that the direction for sale does not come into operation for 100 years after the testator's death, we submit that the gift is not too remote because as soon as the trust for sale arises both the maximum and minimum limits are ascertained. In point of fact the estate tail has determined and the trust for sale has come into operation within a life in being and twenty-one years.

Younger, K.C., and *W. F. Webster*, for the defendants Mrs.

(1) L. R. 7 Ch. 275, 282, 283.
(2) (1865) 34 L. J. (Ch.) 650.
(3) (1880) 5 App. Cas. 714, 722, 723.

JOYCE J. 1912 HAYGARTH, *In re.* WICKHAM *v.* HOLMES.

Whelpton and her children. The limitations of the proceeds of sale are perfectly good in every particular and do not offend the rule against perpetuities if the direction for sale came into operation within a life in being and twenty-one years. The existence of the estate tail makes no difference, because if by reason of the postponement of the trust for sale until the expiration of the estate tail the direction for sale does not come into operation within a life in being and twenty-one years, then we are right both as to the maximum and minimum limits within the rule laid down by James L.J. in *Heasman* v. *Pearse* (1), and all his conditions are fulfilled.

Norton, K.C., and *Dighton Pollock*, for the infant defendant Helen Mary Swayne. So long as a gift vests within a life in being and twenty-one years it does not offend the rule against perpetuities: Gray on Perpetuities, 2nd ed. p. 171. These five cousins are lives in being and the gift to their children at twenty-one is good. But superadded to the limit allowed by this rule is a further limit, namely, that no limitation after an estate tail is too remote: per James L.J. in *Heasman* v. *Pearse* (1); Gray on Perpetuities, 2nd ed. p. 363.

Here there is a gift to such of the testator's named cousins as shall be living when the estate tail determines and the direction for sale comes into operation and to such of the children then living as shall attain twenty-one of such of the cousins as shall be then dead. Now one of two things must happen, the expiration of the estate tail must take place either before or after all the children of Mrs. Swayne attain twenty-one. If before, then the children to take must be ascertained within a life in being and twenty-one years. If after, then although it takes place 100 years after, the gift to the children is good because it must vest immediately on the expiration of the estate tail, and they are all then ready to come in. That comes within the statement by James L.J. in *Heasman* v. *Pearse*. (1) In that case there was no contingency of attaining twenty-one, and so it was not necessary for James L.J. to include that contingency in his statement.

Hughes, K.C., and *E. Beaumont*, for the defendant residuary

(1) L. R. 7 Ch. 275, 282, 283.

legatees other than E. B. Haygarth. There is no exact authority on the point. If the statement of James L.J. is read as a complete statement of the law, then this case is not within it, because on the determination of the estate tail the class to take is not necessarily ascertained. Even now it is not possible to say whether there will be two or three shares, because if the infant defendant H. M. Swayne dies under twenty-one there will be two shares, not three. It is said that a limitation after an estate tail is not rendered void by the fact that it comes after an estate tail, because the entail can be barred, but that is always subject to this, that it must also be possible to ascertain the legal and beneficial interests at or before the determination of the estate tail, and we submit that no remainder after an estate tail is good unless it complies with those conditions. It has been contended that a further qualification must be introduced, namely, that the legal and beneficial interests must be ascertained within a life in being and twenty-one years from the testator's death. There is no authority for that. We submit that the statement of James L.J. is a complete statement of the law. The destination of this property cannot be kept in suspense until the infant defendant H. M. Swayne attains twenty-one.

J. M. Gover, for the defendant residuary legatee E. B. Haygarth, adopted the same argument.

T. H. Carson, K.C., in reply.

Cur. adv. vult.

Jan. 22. JOYCE J. In this case I think a new point arises in the law against perpetuities which is not precisely covered by authority. The testator, who died in 1902, devised what he calls his family estate unto and to the use of trustees and their heirs on certain trusts. [His Lordship read the trusts of the will and the ultimate proviso above set out, and continued:] Speaking broadly, the effect of the limitations of the proceeds of sale, subject to the sums to be paid out coupled with the proviso I have just read, is that the fund is given to such of the five named cousins as shall be living at the time when the limitations in tail determine and the trust for sale comes into operation, and the children who, being males, attain twenty-one,

JOYCE J. 1912 HAYGARTH, *In re.* WICKHAM *v.* HOLMES.

or, being females, attain twenty-one or marry, of such one or more of the five named cousins as shall then be dead.

The legal estate in fee is given to trustees, and the limitations in favour of the beneficiaries are all equitable. If by the ultimate proviso the children of a deceased cousin living at the time of the expiration of the estates tail and of the direction for sale coming into operation were not required to attain twenty-one, being males, or, being females, to attain twenty-one or marry, the case in my opinion would be governed by *Heasman* v. *Pearse* (1), because all the persons to take and the shares in which they were to take would be definitely ascertained upon the expiration of the estates tail. The question which arises is whether the proviso that the children of deceased cousins have to attain twenty-one, or, being females, have to attain twenty-one or marry, makes any material difference where, as here, the children of a deceased cousin who, being male, attain twenty-one, or, being females, attain twenty-one or marry, and are so qualified to take subject to the preceding estates tail, cannot fail to be ascertained within the legal period, namely, within a life in being at the testator's decease and twenty-one years after.

The testator died in 1902. Francis Haygarth died in 1911. No estate tail ever came into existence at all, because Francis Haygarth had only one child, who died in infancy many years ago before the death of the testator. On the death of Francis, there being no estate tail at all, two of the five named cousins were living and three were dead. Of the deceased cousins one has left issue, a daughter still living, but under the age of twenty-one years. Whether this child by attaining twenty-one, or marrying under that age, will be qualified to take must necessarily be seen before the expiration of twenty-one years from the death of her mother, who was named in the will and was living at the testator's decease.

Under the limitations in question, and considering the matter as at the testator's death, however events might turn out, it could not possibly happen that, even if the persons to take and their shares were not definitely ascertained on or before the determination of the estates tail, they would still not be

(1) L. R. 7 Ch. 275, 282, 283.

definitely ascertained within a life in being and twenty-one years from the death of the testator. In the circumstances I am unable to see why or in what respect these limitations are objectionable on the ground of remoteness. Under the limitations in question the absolute ownership or power of alienation could not possibly be suspended beyond some life in being and twenty-one years from the death of the testator. Therefore I hold that the objection raised to the validity of these limitations on the ground of remoteness cannot be sustained, and I will make a declaration that the limitations are good and valid, and not void upon the ground of remoteness.

Solicitors : *Tylee & Co.; Metcalfe, Hussey & Hulbert; Ingle, Holmes, Sons & Pott; Barnett & Shirer, for Gold, Edwards & Co., Denbigh; Le Brasseur & Oakley.*

R. M.

In re OWEN.
SLATER *v.* OWEN.

[1911 O. 1355.]

Will—Trust for Conversion with Power to postpone—Tenant for Life and Remainderman—Unauthorized Investments retained—Leasehold sub-let at a Loss—Income.

A testator gave his residuary estate upon trust for sale and conversion with a discretionary power to postpone sale and conversion, and directed the net proceeds of sale to be invested on trust securities and held in trust for his wife for life with remainder to his sons. The will contained no direction as to the income of the estate pending conversion. The estate consisted largely of unauthorized securities, some of which were non-dividend paying and some paid more and some less than 4 per cent. interest:—

Held, that the tenant for life was entitled as from the death of the testator to interest at 4 per cent. on the capital value of the unauthorized securities to be calculated, not on each of the unauthorized securities separately, but on the aggregate value of all the unauthorized securities; and that if in any year the tenant for life on that basis received more than the actual income of the unauthorized securities, the overpayment must be adjusted out of her subsequent income.

The testator was possessed of a residential flat which he held for a

NEVILLE J
1912
OWEN, *In re.*
SLATER *v.* OWEN.

short term of years at a rack rent. The executors, being unable to sell or surrender it, sub-let it at a loss of 50*l.* per annum:—

Held, that the 50*l.* per annum was to be deducted from the income of the residuary estate as an outgoing of the estate.

The principle of *Allen* v. *Embleton* (1858) 4 Drew. 226, applied.

ADJOURNED SUMMONS.

P. B. Owen by his will, dated March 25, 1908, after making certain specific and pecuniary bequests, devised and bequeathed all the residue of his real and personal estate to trustees upon trust for sale and conversion with the fullest power and discretion to postpone the sale and conversion, and out of the moneys to arise from such sale and conversion to pay his funeral and testamentary expenses and debts and the legacies, and to invest the residue of the said moneys in or upon any stocks, funds, or securities in or upon which for the time being trustees should be authorized by law to invest trust funds (but not in any other mode of investment) with power to vary the same, and to pay three equal fifth parts of the income of the said trust moneys and of the investments for the time being representing the same to his wife during her life, and subject to the trusts aforesaid to hold his trust estate and the income thereof upon trust for his two sons as therein mentioned, and the testator appointed his wife and the two plaintiffs executors and trustees of his will.

The testator died on June 20, 1910, and his will, with two immaterial codicils, was proved by all the executors.

The testator's estate at the time of his death was valued at about 80,600*l.* This sum included personal estate, not specifically bequeathed, consisting of stocks, funds, shares, and mortgages valued at about 76,690*l.*, of which amount about 70,851*l.* represented securities which were not authorized trust investments, and 5840*l.* or thereabouts represented authorized investments.

The question then arose whether, having regard to the fact that the testator's will contained no specific direction as to the payment of the income of the estate pending sale and conversion, the testator's widow was entitled as from the death of the testator to three fifths of the income arising from the unauthorized investments held by him at his death and which the executors retained, or to three fifths of interest calculated at 3 per cent. or

4 per cent. per annum on the estimated capital value as at the death of the testator of such investments. By an order made on March 8, 1911, on an originating summons, to which the present plaintiffs and defendants were parties, it was declared that according to the true construction of the will the testator's widow was entitled to three fifths of interest calculated at 4 per cent. per annum on the estimated capital value as at the death of the testator of all the securities held by him which were not authorized trust investments, the surplus income to be invested and treated as added to capital and the income of these investments to be treated as income of the testator's estate to three fifths of which the testator's widow was entitled for life, and that the executors of the testator's will might postpone the conversion of such unauthorized securities for so long as might be necessary for the beneficial realization of the testator's estate.

The executors during the first year sold unauthorized investments to pay administration expenses, and the debts and legacies, and at the end of the year the testator's net residuary personal estate consisted of retained unauthorized securities of which the estimated capital value as at the death of the testator was about 46,868*l*., and authorized securities of which the estimated capital value at the same date was 5480*l*. Of the retained unauthorized investments, some were non-dividend paying, some paid less than 4 per cent., and others paid 4 per cent. and upwards on their estimated capital value as at the death of the testator. The capital value of some of these securities was below par, some were at par, and others were above par value. The testator was also possessed of a residential flat in London for a term of three years from December, 1909, at the rack rent of 300*l*. per annum. On his death the executors were unable to sell or surrender the flat, and they sub-let it for the remainder of the term at 250*l*. per annum, which was the best rent they could obtain.

Further questions arose as to how the income of the testator's estate should be dealt with having regard to the previous order, and the present summons asked (amongst other things) whether the interest at 4 per cent. per annum mentioned in the order of March 8, 1911, should be calculated on the

NEVILLE J.
1912
OWEN, *In re.* SLATER *v.* OWEN.

estimated capital value as at the death of the testator of each one of the unauthorized investments held by the testator, or whether at the end of the first year from the death of the testator interest at 4 per cent. should be calculated for the whole of such year on the estimated capital value as at the death of the aggregate of all the unauthorized investments held by the testator, and including therein such of the same investments (i.) as had been realized by the executors, (ii.) or as paid less than 4 per cent. per annum on their capital value, or (iii.) were non-dividend paying, and three fifths of such interest paid to the defendant tenant for life; and whether the rent and any other outgoings payable by the executors in respect of the leasehold flat should be charged against, and the rent received by the executors in respect of the said flat credited to the income of the testator's estate, or how else should such rents and outgoings be dealt with by the executors.

T. L. Wilkinson, for the plaintiffs.

Pattisson, for the widow, submitted that under the order interest should be calculated on the aggregate value of all the unauthorized securities.

[He was stopped.]

Ward Coldridge, for the two sons of the testator. It is submitted that, in calculating the interest at 4 per cent. under the order, each security should be considered separately. A tenant for life of stock is only entitled to the income of the stock or part of it, and is not entitled to any part of the capital. To give the tenant for life 4 per cent. interest on non-producing capital is giving her something she is not entitled to. Her right must be limited to the income produced, and if she is temporarily paid out of capital the overpayment must be made good by her. There is no direct authority, but the point is mentioned in Theobald on Wills, 7th ed. p. 560; *Wentworth* v. *Wentworth*. (1) The order here is based on the hypothesis that there would be a surplus, but the income of the estate for the first year was insufficient to meet 4 per cent. on the aggregate value of the securities because part of the income was apportioned to capital. She has been overpaid about 200*l*., which must be recouped to the

(1) [1900] A. C. 163, 172.

estate. As to the leasehold, the loss of 50*l.* should be treated as a loss of income. If the leasehold was sub-let at 350*l.* the tenant for life would claim the excess.

Pattisson, in reply, on the first point referred to *In re Earl of Chesterfield's Trusts*. (1) As to the leasehold, the loss of 50*l.* is a capital loss chargeable against the estate: *Earl of Lonsdale* v. *Countess Berchtoldt* (2); *Allen* v. *Embleton*. (3) The leasehold is an unauthorized investment and ought to be valued, and the tenant for life is only entitled to 4 per cent. interest on the value.

NEVILLE J. In this case the first question I have to consider depends upon the order made on the previous summons which declared that the tenant for life was entitled to three fifths of the interest calculated at 4 per cent. per annum on the estimated capital value as at the death of the testator of all the unauthorized securities held by him, and directed the surplus income to be accumulated. [His Lordship read the order of March 8, 1911, and continued:] I think it is clear that at the time that declaration was made the attention of the Court was not called to the questions which are now raised and which result from the fact that some of the unauthorized investments produce no interest at all, some do not produce as much as 4 per cent., and that the aggregate income of the estate may be insufficient to provide an allowance of 4 per cent. on the estimated capital value of the unauthorized securities. It appears to me that the order deals with the aggregate capital value of all the unauthorized securities and allows 4 per cent. upon that amount. I also think that that order was right under the circumstances then before me, and that it is the order I ought to have made, even supposing that the facts which have now been brought to my attention had then been before me. The question depends upon the conventional rule which has been adopted by the Court in cases where a testator has disposed of his property to trustees upon trust for sale with a discretionary power to postpone the conversion of all or any part of the estate, and has given his property to a tenant for life with remainder

(1) (1883) 24 Ch. D. 643. (2) (1857) 3 K. & J. 185.
(3) 4 Drew. 226.

NEVILLE J. 1912 OWEN, *In re.* SLATER *v.* OWEN.

over, but has not provided that until sale the tenant for life shall have the benefit of the actual income produced by the unauthorized securities which, under the discretion to postpone, the trustees may have retained. The Court in such a case has adopted a rule of taking the estimated capital value of the unauthorized securities at the death of the testator and allowing to the tenant for life 4 per cent. interest upon the estimated amount, and directing that in regard to the surplus income arising out of the unauthorized investments there should be accumulation and capitalization of that income. First of all, I think it is clear from the authorities that the whole basis of that rule is that it was not intended thereby to alter the relative positions of the tenant for life and the remainderman, and that the discretion given to the trustees is a discretion to be exercised for the benefit of the estate, and not by any means necessarily with a nice consideration of how the tenant for life will be affected by the retention of the securities, or how the remainderman will be affected, but whether the estate itself—the property entrusted to their charge—is likely to realize better if converted at once or is likely to realize better if some or all of it is retained until a future time. The rule, as I say, is conventional, and the question now arises as to how it is to be applied in the case where some of the unauthorized investments retained by the trustees produce an income in excess of the 4 per cent. allowed by the Court and some produce either no income at all or an income less than the 4 per cent. In my opinion the value of the unauthorized investments, as I said before, ought to be aggregated and interest allowed on the whole of that aggregate value at the rate mentioned. Then comes the question, what is to be done when the income actually produced by the estate does not produce sufficient to provide the 4 per cent.? With regard to that the present case is free from difficulty. What I have to do here is not so much to decide whether the rights of the tenant for life must invariably be limited to the total amount of the income actually produced by the estate, but what is the meaning of the order which is now before me. I cannot construe it to be more than an order intended to deal with the income of the estate, because the direction is that the surplus income

is to be invested and treated as added to capital. I think that it was not present to anybody's mind that the income might be insufficient to pay 4 per cent., and the order deals with income and not with capital. I think, therefore, that the matter must be adjusted, and if the tenant for life has received more than the aggregate income of the total estate during the first year, that must be made right in subsequent payments. I understand that it is anticipated at all events that the income will be sufficient to recoup the estate in regard to other payments made to the tenant for life in the early stages of the administration. That disposes of the first point raised.

Another point is this. The testator at his death was tenant of a flat in London at a rack rent of 300*l.* a year. That rack-rented leasehold undoubtedly passed as part of his estate to the trustees upon trust to be dealt with in accordance with the directions he had given. It was a damnosa hæreditas, and was not worth anything. It could not be sold or surrendered, but the trustees have succeeded in sub-letting it for the remainder of the term at 250*l.* per annum, and consequently there is a loss of 50*l.* a year for the residue of the tenancy vested in the testator at his death. The question is whether that loss is a charge on income, that is to say, if the income of the estate is to be calculated after deducting the loss of income on this particular property, or whether it is to be treated as a debt of the testator which must be discharged out of capital. It seems to me that the case of *Allen* v. *Embleton* (1) deals exactly with the point, and decides that in such a case the income must be calculated after deducting the rent and outgoings of property which form the residue of the estate. In that case the testator was the lessee of property, the lease of which he assigned during his lifetime to another, so that at the date of his death he was under the burden of the covenants which he had entered into upon taking the lease, but the property was not in his possession nor had he any title to it. He had assigned his lease away to somebody else, but under circumstances which are not material the lease ultimately became revested in his executors owing to the bankruptcy of the assign. The Vice-Chancellor in dealing with that case held that having

(1) 4 Drew. 226.

NEVILLE J. 1912 OWEN, *In re.* SLATER *v.* OWEN.

regard to the circumstances the obligations under the lease were debts of the testator which had to be charged on the capital. But he says this (1): "Now, if the leasehold in question had remained the property of the testator"—which is this case—"if it had not been assigned to Marter, then this leasehold would have formed part of the testator's residuary personal estate, and the tenant for life would have been tenant for life of this and the other leaseholds; and then the tenant for life would have had no right to say, I will take leasehold A. because it is beneficial, and I will repudiate leasehold B. because it is not beneficial; and, if I were deciding anything trenching on that principle, I should be wrong." That seems to me to deal directly with the point that inasmuch as this flat was property owned by the testator at the date of his death, notwithstanding that the burden of it was greater than the benefit, it was part of that which passed to the residuary legatees, and the residuary legatees must either repudiate the whole or take the whole subject to any burden which may attach to it. I think, therefore, that, in considering what is the income of the estate, this 50*l.* must be allowed as part of the outgoings.

Solicitors: *Stock & Slater; A. H. Baker.*

(1) 4 Drew. 229.

H. L. F.

KYNOCH, LIMITED *v.* ROWLANDS.

C. A.
1911
JOYCE J.
May 2, 3, 4, 5 6, 8, 30.
C. A.
Nov. 8, 9.

[1910 K. 481.]

Trespass by Tipping against Wall—Adjoining Owners of Land—Boundary—Erection of Wall within Boundary Line—Abandonment—Discontinuance of Possession — Adverse Possession—Statute of Limitations—Real Property Limitation Acts, 1833 *and* 1874 (3 *&* 4 *Will.* 4, *c.* 27, *ss.* 2, 3; 37 *&* 38 *Vict. c.* 57, *s.* 1).

The plaintiffs and defendant were adjoining owners of land physically divided by a dry ditch or channel of an ancient watercourse. In 1894 the plaintiffs built on their own side of the ditch an enclosing wall. In an action between the parties at that date it was judicially determined that the true boundary was the middle line of the ditch. The erection of the wall left unenclosed a narrow strip of land belonging to the plaintiffs, the real boundary, though known to both parties, remaining unmarked.

In 1910 the plaintiffs brought an action to restrain the defendant from trespassing on the strip by tipping earth and rubbish upon it and against the wall; the defendant contended that by the erection of the wall the plaintiffs had abandoned the strip and that the defendant had acquired exclusive possession and retained it for more than the period required to establish a possessory title under the Statute of Limitations. The only evidence of such possession by the defendant was that cattle belonging to his tenants had been allowed to graze such herbage as grew in the ditch and on the strip between it and the wall:—

Held, that there had been no abandonment or discontinuance of possession by the plaintiffs and that they were entitled to judgment.

Decision of Joyce J. affirmed.

Appeal from a decision of Joyce J.

This was an action for an injunction to restrain the defendants J. Rowlands and A. Wells from tipping or placing rubbish, refuse, or other matter on or against the land and buildings of the plaintiff company, and for a mandatory order for the removal of the refuse so tipped.

The only question involved in the action calling for a report was a question relating to the boundaries of the plaintiff company's land and arose in the following circumstances:—

The plaintiff company were the owners of certain land and buildings known as the Lion Works, at Witton, Staffordshire, and in 1894 had built entirely on their own ground a wall about 10 ft. 6 in.

C. A. 1911 KYNOCH, LIMITED v. ROWLANDS.

high enclosing their works. Throughout a considerable part of its length on the eastern side of their works, this wall was built well within the eastern boundary of the plaintiff company's land, so that where this was done there was between the wall and the eastern boundary of their land a strip of land belonging to the company varying in breadth according to the distance of this wall from their eastern boundary. The buttresses and the foundations and footings of the plaintiffs' wall, on both the east and west sides of the wall, projected horizontally just underneath the surface some inches beyond the face of the wall, but always on the company's property.

The defendant Rowlands was the owner of the land on the east side of the plaintiff company's eastern boundary, his property being divided from that of the plaintiff company by the dry channel of an ancient watercourse.

After the erection of the wall the defendant Rowlands had complained that it had been built on his land, and in 1894 through his trustee, Mansell, sued the company for trespass in erecting the wall where they had done, the question being whether the boundary between the two properties was the edge or the middle line of this channel. In their pleadings in that action the company denied the trespass and counterclaimed for a declaration that the middle of the watercourse was the boundary between the two properties.

That action was tried at Birmingham in 1894 before Cave J., who determined that the true boundary was the middle line of the channel. Mr. Wilmot, a surveyor, was appointed to set out upon a plan—referred to as plan "P"—the middle line of the channel, and the line so set out by him, so far as it related to the particular portion of the wall the subject-matter of this report, lay outside of and on the eastern side of the wall, the result being that a narrow strip of land averaging about eighteen inches in width measured from the face of the wall and extending eastwards further than the footings of the wall was determined to be the plaintiff company's property. No order in that action was ever drawn up.

The writ in the present action was issued on July 5, 1910, and in their statement of claim the plaintiffs alleged that the

defendants Rowlands and Wells had trespassed upon the said wall and strip of land by tipping on or against the same large quantities of refuse, thereby greatly raising the height of the strip of land, and by correspondingly decreasing the height of their wall had rendered it less efficacious and useful than formerly in keeping out trespassers and unauthorized persons from the company's works. The plaintiffs also alleged that the tipping had caused serious damage to their wall.

In his defence the defendant Rowlands alleged that the plaintiffs in 1894 built the wall for the very purpose of forming their boundary, that by its erection they intended to and did discontinue and give up to him the possession, enjoyment, and ownership of any intervening strip, and that since the end of 1894 he had been in quiet and undisturbed possession of the same by himself or his tenants as owner and as of right, and he claimed the benefit of the Real Property Limitation Acts.

The defence of the defendant Wells, who had been authorized by the defendant Rowlands to do the tipping in question, was to the like effect.

From the particulars furnished by the plaintiffs of their acts of ownership over the strip in question and from their evidence at the trial it appeared that in the years 1902, 1905, and 1908 the plaintiffs had made use of the strip for the purpose of executing repairs to and of heightening and rebuilding their wall.

The evidence of one of the witnesses for the defence, who was a farmer and dairyman and tenant of the defendant Rowlands' land, was to the effect that the land to the east of the plaintiffs' wall was grazing land, and that as long as there was any grass his cows went across and grazed right up to the wall whatever grass there was on the land in dispute.

The action came on for hearing before Joyce J. on May 2, 1911.

Younger, *K.C.*, and *D. D. Robertson*, for the plaintiffs. There has been neither abandonment by the plaintiffs of the strip in question, nor acquisition of it by the defendant Rowlands, and both are essential to the defendants' case.

Hughes, *K.C.*, and *Sargant*, for the defendant Rowlands. The making of the wall in 1894 marked the plaintiffs' boundary,

C. A. 1911 — KYNOCH, LIMITED v. ROWLANDS.

and the strip was then abandoned by them and their title is now extinguished: Real Property Limitation Act, 1833, ss. 2 and 3; *Norton* v. *London and North Western Ry. Co.* (1); *Marshall* v. *Taylor* (2); *Midland Ry. Co.* v. *Wright.* (3)

Mulligan, for the defendant Wells, adopted the same argument, and cited *Littledale* v. *Liverpool College* (4) in support of the contention that the plaintiffs' acts of ownership were not done by them with the intention of asserting or retaining ownership. [He also referred to *Jones* v. *Williams* (5) and *Rains* v. *Buxton.* (6)]

Cur. adv. vult.

May 30. JOYCE J. This is an action for trespass by tipping earth and rubbish to the depth of some three feet, more or less, against the eastern side of the wall of the plaintiffs, surrounding their well-known manufactory of explosives at Birmingham. This appears to have been done in order to raise and level the surface of the ground on the east of the wall for the gardens of houses to be erected by the defendant Rowlands, or his lessees, in developing his land on that side.

This wall was built by the plaintiffs entirely upon their own ground in the years 1894 and 1895, and with the buttresses thereof and the foundations and footings, which, as is usually the case, project horizontally just underneath the surface some inches beyond the face of the wall, was originally and still is the property of the plaintiffs, and neither of the defendants has or ever had any right or easement over or with respect thereto either above or below the ground. [His Lordship then dealt with the question relating to the tipping of earth and rubbish by the defendants against the plaintiffs' wall and said that in his opinion the defendants had rendered themselves liable to at least nominal damages for trespass—*Gregory* v. *Piper* (7)—and also for all actual damage present or future occasioned to the wall or the owners consequential upon the trespass. His Lordship then continued:] But the defendants have, in my opinion, not only

(1) (1879) 13 Ch. D. 268.
(2) [1895] 1 Ch. 641.
(3) [1901] 1 Ch. 738.
(4) [1900] 1 Ch. 19.
(5) (1837) 2 M. & W. 326.
(6) (1880) 14 Ch. D. 537.
(7) (1829) 9 B. & C. 591.

committed a trespass against the plaintiffs in respect of the face of the wall itself, but even if their tipping operations had not actually touched the face of the wall they have trespassed upon the strip of surface overlying the projecting eastern footings of the wall, which (both footings and buttresses) when the wall was erected were so placed as to be entirely on the plaintiffs' own ground.

It was suggested on the part of the defendants that the strip of surface a few inches in width, the property of the plaintiffs, in or beneath which they placed the footings and foundations of the eastern side of their wall, ceased to belong to the plaintiffs as soon as the wall was erected, and at once became the property of the owner of the land on the east. I have never been able to understand what rational ground there was for this suggestion. But then it was also said that cows belonging to the occupier of the land of the defendant Rowlands to the east of the wall did or would naturally graze upon the ground up to the face of the wall, and that thereby the plaintiffs, the original owners of the narrow strip outside this wall on the east, have been dispossessed thereof, and that the defendant Rowlands or his tenants thus obtained exclusive possession of this strip of surface and as against the plaintiffs acquired an absolute title thereto by virtue of the provisions of the Real Property Limitation Act, 1833, before the commencement of this action. I am not sure that any grass or other edible herbage ever grew upon the strip of surface over the footings of the wall. The evidence, if it can be so called, with respect to the cows is of the most meagre and vague description and, in my opinion, not worthy of serious consideration. Besides, if I own the fence with a ditch on the other side between my land and my neighbour's field, my neighbour will not, by lapse of time, acquire the ownership of the ditch merely because his sheep or cattle may have cropped such herbage, if any, as grew upon the sides of the ditch or in the bottom of the hedge. I do not lose my ditch simply because I do not maintain another fence or place a line of barbed wire on the outer edge of it. In order to acquire any property in the ditch as against me my neighbour must take actual possession of it, as, for instance, by cultivating the ground, building upon

C. A. 1911

KYNOCH, LIMITED v. ROWLANDS.

Joyce J.

or paving it, as in *Marshall* v. *Taylor* (1), or something of that kind. *Marshall* v. *Taylor* (1) entirely agrees with *Norton* v. *London and North Western Ry. Co.* (2) He must, in my opinion, at least do something for which if I knew of it I could reasonably maintain an action of trespass or ejectment.

In the present case it is not even alleged that there has been anything of this kind upon the strip outside the wall.

The matter, however, does not rest here. The wall of the plaintiffs was erected up to the whole, or at least part, of its height in the years 1894-95 (I mean before the date of the award), and there was no arrangement express or implied between the adjoining owners with respect to the position in which it should be built. So far from the wall being erected where it was in pursuance of any arrangement or understanding that the plaintiffs should abandon and give up to the defendant Rowlands any strip of land belonging to the plaintiffs on the outside of the eastern face of the wall, this defendant Rowlands complained that the wall had been built on his land, and through his trustee Mansell sued the present plaintiffs for trespass in erecting the wall where they did. If I understand the matter rightly, the property of the plaintiffs was divided from that of the defendant Rowlands by the dry channel of an ancient watercourse—whether originally artificial or a natural watercourse is not clear, and I think was in dispute, the question really being whether the boundary was the edge or the middle line of this channel. The action came on to be tried at Birmingham before Cave J. without a jury at the autumn assizes of 1894. It then appeared and the judge determined that the true boundary between the property of the plaintiffs and that of Rowlands was the middle line of the channel I have mentioned; the plaintiffs' wall being placed wholly on the western, that is their own, side of this line, though in some places probably the wall was built upon the western edge of the channel, or even, to a small extent, probably actually in or upon the plaintiffs' half of the channel itself. A surveyor, Mr. Wilmot, who appeared as a witness before me, was appointed to set out upon a plan the middle line of this channel or watercourse, and so mark the real and true boundary between

(1) [1895] 1 Ch. 641. (2) 13 Ch. D. 268.

the property of the present plaintiffs and that of the then plaintiff and now defendant Rowlands. The finding of this surveyor, apparently quite a competent person, is contained in a written document with a plan P referred to therein, executed and published by the surveyor on July 30, 1895. This plan P defines the boundary by a red line, which line so far as relates to the portion of the wall in question in this case lies outside the wall that is on its eastern side, the result being that a narrow strip of land on an average about eighteen inches in width measured from the face of the wall and extending eastwards further than the footings of the wall was determined to be the property of the plaintiffs. This finding or determination was perfectly well known to and understood by the defendant Rowlands, and, to use his own expression in the witness-box, he accepted it.

It being thus judicially ascertained and determined between the plaintiffs and the defendant Rowlands in the year 1895 that the narrow strip of ground east of the wall between it and the line indicated by the red line on map P was the property of the plaintiffs, it manifestly still so remains, unless the plaintiffs have since been dispossessed and the defendant Rowlands has acquired exclusive possession and retained it for more than the period required to confer a title under the Statute of Limitations, or, more accurately, the Real Property Limitation Act, 1833. Putting aside the suggestion that this must result from the alleged grazing of the cows of the tenant up to or near the wall, if indeed there was anything to graze there and the cows ever went near the wall, which, having regard to the nature and condition of the ground, I very much doubt, there is no evidence of any act of possession on the part of Rowlands or his tenant; while as a matter of fact the plaintiffs have, though not frequently, made use of the strip in alterations or repairs to their buildings and otherwise when occasion required.

It is quite clear that both parties cannot have been in possession of this strip. "Possession is single and exclusive. As the Romans said, 'plures eandem rem in solidum possidere non possunt'"; and it is a well-settled principle with reference to land at all events, and, I think, also with reference to

C. A. 1911 KYNOCH, LIMITED v. ROWLANDS. Joyce J.

chattels, that where possession in fact is undetermined or the evidence is indecisive, possession in law follows the right to possess. As far back as the time of Littleton it was said: "Where two be in one house or other tenements together to claim the said lands and tenements, and the one claimeth by one title, and the other by another title, the law shall adjudge him in possession that hath right to have the possession of the same tenements." (See Pollock and Wright on Possession, pp. 20, 24.) In the important leading case of *Jones* v. *Chapman* (1), Maule J., giving a most instructive judgment, said: "If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is, which of those two is in actual possession, I answer, the person who has the title is in actual possession, and the other person is a trespasser."

The result is that I entirely reject the claim of the defendant Rowlands to have acquired ownership of this strip from the plaintiffs since the date of Mr. Wilmot's award, and if I am right in my view of the law of this case there has been an unjustifiable trespass to the property of the plaintiffs not merely by tipping against the face of the wall but by tipping upon the strip of surface, a few inches in width, lying over the footings upon the eastern side, and if the plaintiffs still own the strip between the red line on plan P and the site of the wall, as I think they do, there has been a trespass by tipping upon the surface of this strip where it extends to the east beyond the narrow strip of ground lying over the footings.

[His Lordship then made a mandatory order for the removal of what had been tipped against the face of the wall, granted an injunction against further tipping, and awarded damages, with costs to be paid by the defendants.]

R. M.

C. A.

From this decision the defendants appealed. The appeal came on for hearing on November 8, 1911.

Hughes, K.C., and *Sargant*, for the appellant Rowlands. The building of the wall where it is, namely, in a position

(1) (1847) 2 Ex. 803, 821.

slightly to the west of the line marked out as the true boundary in plan P, is evidence of an intention on the part of the respondents to abandon everything to the east of the wall, and constitutes a discontinuance of possession by them.

[FARWELL L.J. You must shew not only discontinuance, but some act of possession by Rowlands.]

His tenants are in occupation of the whole of the land to the east of the wall and their cattle grazed it right up to the wall. It is sufficient for Rowlands to shew discontinuance by Kynochs and possession by himself and his tenants: *Rains* v. *Buxton*. (1) Fry J. in that case said that discontinuance of possession is "where the person in possession goes out and is followed into possession by other persons"; and on that question it is immaterial to shew what was the intention of the owner and that he has in fact been succeeded by others: Carson's Real Property Statutes, 2nd ed. p. 133. The possession after the discontinuance need not be in the nature of adverse possession. The right of the original owner to the land is extinguished after discontinuance of possession for the statutory period: *Norton* v. *London and North Western Ry. Co.* (2); *Marshall* v. *Taylor* (3); *Midland Ry. Co.* v. *Wright*. (4)

[FARWELL L.J. In this case the judgment in the action in 1894 makes the whole difference. It is unnecessary to go into the authorities as to discontinuance of possession in an ordinary case.]

Mulligan, for the appellant Wells.

Hon. Frank Russell, K.C., and *D. D. Robertson*, for the respondents, were not called upon.

COZENS-HARDY M.R. This is an appeal from a judgment of Joyce J., and I wish to say at once that I so entirely and absolutely agree with his judgment, so far as it deals with propositions of law, that I hesitate to add, if it were possible, one word to the strength of the reasons given by the learned judge.

The material facts may be very shortly stated. Kynochs and Rowlands were adjacent owners. Kynochs put up a wall which

(1) 14 Ch. D. 537, 539.
(2) 13 Ch. D. 268.
(3) [1895] 1 Ch. 641.
(4) [1901] 1 Ch. 738.

C. A. 1911 — KYNOCH, LIMITED v. ROWLANDS. — Cozens-Hardy M.R.

at a date in 1895, to which I shall presently refer, was not finished, and Rowlands commenced an action against Kynochs for trespass, and it was a claim that this wall was built on Rowlands' land. Kynochs by the pleadings in the action denied that, and by their counter-claim they asked for a declaration, not that the wall was the boundary of their property—far from that—but that the middle of a natural watercourse was the boundary line between the two properties. The action and the counter-claim came on together for trial before Cave J. without a jury. He decided, and it is immaterial whether the order was drawn up or not, that the boundary between the two properties was the middle line of this watercourse, and then, whether it was by arrangement between the parties I know not, it was referred to a Mr. Wilmot to define the true boundary. He visited the spot, and made an award and a plan, of which I have the original before me, and he shews by a red line on this plan what was the true boundary of the property between Kynochs and Rowlands. Now we have been asked to say that the effect of the building of the wall, in the place where it is, namely, on Kynochs' side of the red line, was evidence of an abandonment of everything to the east of that wall, and that the effect of the building of that wall in those circumstances was a discontinuance of possession by Kynochs, in this sense, that the intervening strip between the existing wall and the red line was abandoned to Rowlands, and that, Rowlands having been in possession for many years, the plaintiffs had no title whatever to this strip of land. That seems to me to be an argument which might have had force, if there had been no litigation about the boundary. If all we knew was that in 1894, the boundary being doubtful, a wall had been built, one would have struggled to arrive at a conclusion, and it might well be at a proper conclusion, that the wall, which was obviously erected with notice to Rowlands, was put where it was as a true boundary between Rowlands and Kynochs, on a give and take line, and the Court would very possibly, I say no more, have come to the conclusion, in those circumstances, that the wall must be taken to be the real and true boundary between the two parties. How that is possible, in the face of these proceedings, puzzles me very much. And to say that Kynochs abandoned

this strip of land outside the wall when in the litigation they were asserting their title to it really passes my conception. I do not understand how a mere intention to abandon, apart from acts of possession, exclusive possession, by the person who had not the title is a relevant matter at all. No doubt there may be circumstances under which you must have regard to the nature of the property, and I concede in favour of the appellant Rowlands that slighter acts of possession and ownership may be found sufficient in one case than in another. All that seems to me to have absolutely no application to the present case. The learned judge has found, with reference to that part of the wall with which we alone have to do, that there is undoubtedly a strip of land the title to which, under Wilmot's map, was vested in Kynochs. They have done nothing actively to alter that position. They have exercised some slight acts of ownership on this land, to which for the present purpose I do not think it necessary to attach very great importance, but only to what Rowlands or persons claiming under him have done. The learned judge finds, and I entirely agree with him, that there is not one single act of ownership by Rowlands, or any person claiming under him, in respect of the strip with which alone we are now concerned, and I think it is absolutely irrelevant to consider whether, apart from the erection, apart from what took place, there might have been evidence to shew that this was, at the original erection of the wall, by arrangement given to and taken by Rowlands; but then we have been asked to hold that there was evidence of exclusive possession of this strip by Rowlands or his tenants.

Now what are the facts? The facts are that this is an extremely narrow strip of land on the outside of a little grass field, a very rough grass field. To call it a ditch is perhaps to pay it too high a compliment. It is two feet by three feet and the width varies from nothing to three feet in the widest place. This being the state of things, Kynochs did not do that which they were not bound to do; they did not put a wire or any other fence along the red line. They left their boundary unmarked, perfectly well known to Rowlands, because he is cognizant of this plan. Kynochs did not put up a boundary on the red line.

C. A. 1911

KYNOCH, LIMITED v. ROWLANDS.

Cozens-Hardy M.R.

Well, it is said that the mere fact that cows, when grazing on this pasture field, which admittedly belongs to Rowlands, used to go into this ditch when there was any grass to be found there (if ever there was, which I greatly doubt) was an act of possession, and in fact evidence of possession by Rowlands and his tenants. I do not think I can possibly improve upon what was said by the learned judge on the law on that point. It would be disastrous to hold that the mere occasional straying of cattle over a known boundary by reason of there not being a fence or anything of that kind is, as against the true owner, an act of such exclusive possession as will enable the trespasser whose cattle have strayed over the boundary to acquire a statutory title. In my opinion this is a perfectly plain case, the judgment of Joyce J. was right in every particular, and this appeal must be dismissed with costs.

FLETCHER MOULTON L.J. I fully agree with the judgment which has just been delivered and also with the judgment of the judge in the Court below. I will add very few words. A point has been raised as to discontinuance of possession as opposed to dispossession. I do not feel called upon to examine into that question, but if this so-called discontinuance of possession depends in any way on the intention of the legal owners, there is not in this case the slightest justification for saying that there is evidence of discontinuance or intention to discontinue on the part of the plaintiffs. On the contrary, they asserted their title by legal proceedings and established it, and I cannot see that there has been from that time to the present any single act which they ought to have done on this land and did not do which was of such a nature that it could furnish evidence of intention to discontinue possession. I can see no reason for supposing that the middle line of the wall was ever intended to be a boundary, even if there had not been the judgment in the action which conclusively established that it was not so. This wall has buttresses on both sides, and inasmuch as in the ordinary course of building it the building owner would put his buttresses on land of his own, the ordinary line of the wall would be somewhat within his boundary. So that even apart from the question of

the action, which established beyond all controversy that there was no intention on the part of the plaintiffs to abandon the strip outside the wall, I should say that it would be improper to infer from the mere fact of the building of the wall an intention on the part of the owner to abandon everything lying outside right up to the wall itself.

For these reasons and for the reasons stated by the Master of the Rolls and the learned judge in the Court below, I am of opinion that there is no ground whatever for this appeal.

FARWELL L.J. I agree. I only desire to add that it is necessary that there should be not only absence of possession by the person who is alleged to have gone out of possession, but also actual possession, or acts of ownership amounting to actual possession, by somebody else. In my opinion this is a perfectly hopeless appeal.

Solicitors: *H. P. Becher, for Rowlands & Co., Birmingham; Cridland & Nell; Morris & Bristow, for William Morris, Birmingham.*

G. A. S.

SWINFEN EADY J.

1911

Dec. 14, 15.

1912

Feb. 12, 20.

In re CONSUELO, DOWAGER DUCHESS OF MANCHESTER.

VISCOUNT DUNCANNON *v.* DUKE OF MANCHESTER.

[1910 M. 269.]

Revenue — Estate Duty — Settlement Estate Duty — Testatrix domiciled in England — Personal Property situate Abroad — Separate Executors of Foreign Property—Liability of English Executors—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, *sub-s.* 2; *ss.* 5, 6, *sub-s.* 2; *s.* 8, *sub-s.* 3; *s.* 9, *sub-s.* 4—*Finance Act*, 1896 (59 & 60 *Vict. c.* 28), *s.* 19.

The English executors of a testatrix domiciled in England are to the extent of the assets in their hands liable to pay English estate duty and settlement estate duty on foreign personalty, although this foreign personalty is expressly bequeathed to foreign executors and remains under their sole control.

Consuelo, Dowager Duchess of Manchester, died on November 20, 1909, domiciled in England and possessed of considerable personal property locally situate in England and America respectively.

By her will dated January 7, 1909, as altered by a codicil dated October 28, 1909, she appointed two Englishmen general executors and trustees of her will and gave to them all her property not otherwise disposed of upon the trusts therein mentioned. By the same will she appointed three Americans to be her executors as to any property for which it might be necessary that probate of her will should be taken out in America, and trustees of the property thereafter given to them, and she gave to them all her real and personal estate which should be locally situate in the United States or elsewhere in America upon the trusts therein mentioned. The English and American assets were charged with the payment of debts due in England and America respectively and with payment of different specific and pecuniary legacies, but the ultimate trusts of the residue in each case were the same, giving the Duke a protected life interest, with the usual discretionary trust and subsequent trusts in favour of his infant children. The will was proved by the English executors

in England on December 17, 1909, and by the American executors in America on June 8, 1910. In the affidavit for probate in England the executors swore the amount of the English estate at 120,000*l.* and estimated the value of the American estate at 200,000*l.* It was now stated to be estimated at 400,000*l.*

The English executors commenced an action for the administration of the estate to which the Duke and Duchess of Manchester and their infant children were made defendants, and took out this summons for the determination, among others, of the questions whether estate duty and settlement estate duty were payable in respect of the American property, and whether the English executors were liable for the payment.

The Commissioners of Inland Revenue were, by consent, made parties to the summons, and submitted to the jurisdiction for the purpose of having the questions decided in these proceedings. The American executors had been made defendants, but refused to submit to the jurisdiction, and got themselves struck out. They declined to give the English executors any particulars of the testatrix's property in America.

The question of estate duty was argued first.

Hon. E. C. Macnaghten, K.C., and *T. T. Methold*, for the English executors, stated the facts.

Astbury, K.C., and *Manby*, for the Duke and Duchess of Manchester. The question is whether the English executors are liable to pay estate duty on the personal property bequeathed to the American executors. The English executors have no title to the American assets and have no means of ascertaining their nature or amount. The actual question has never been decided, but it will no doubt be contended that the testatrix's domicil is the determining factor, and that as her domicil was English, estate duty is payable on foreign movables. There we join issue. Domicil is no doubt an important factor, but it is not the only factor. Administration, control, or receipt within the domicil is also necessary. The English executors are only liable for duty on what they can control or administer, and the beneficiaries on what they receive over here.

Estate duty is imposed by the Finance Act, 1894. Sect. 1 imposes

SWINFEN EADY J.

1911

MANCHESTER (DOWAGER DUCHESS), *In re.* DUNCANNON (VISCOUNT) *v.* MANCHESTER (DUKE).

the duty on "the principal value ascertained as hereinafter provided" of all property passing on the death of every person. This must clearly be limited. It does not include the foreign assets of a person domiciled abroad, even if there are assets in England. Sect. 2, sub-s. 2, provides that property situate out of the United Kingdom shall be included only if legacy or succession duty is payable in respect thereof. If a testator domiciled in England makes an English will disposing of his English assets to English executors, and a foreign will disposing of his foreign assets to foreign executors, the foreign assets in the hands of the foreign executors cannot surely be liable to English legacy or succession duty. The English executors cannot touch these assets, and legacy duty cannot be payable till they are received.

In the present case the American executors were made defendants. They declined to submit to the jurisdiction and refused to pay English estate duty on the American assets out of those assets. Surely the English executors are not bound to pay it out of the English assets. In the Inland Revenue affidavit they estimated the American assets at 200,000*l.*, and the duty had to be paid before probate issued. The present application is to recover the duty paid on the American assets.

The duty of the executor is pointed out in s. 6, sub-s. 2, which provides that the executor "shall" pay the estate duty in respect of all personal property (wheresoever situate) of which the deceased was competent to dispose, on delivering the Inland Revenue affidavit. He "may" pay the duty in respect of "any other property" which by virtue of any testamentary disposition of the deceased is under his control, or, if not under his control, if the persons accountable request him to pay it. The first part of the sub-section must clearly be limited to property which the executor is administering and which is under his control. And there are constant indications in the Act that the property referred to is so limited. Sect. 6, sub-s. 3, provides that if the executor does not know the amount or value of any property he may say so but must undertake to bring in an account "as soon as the amount and value are ascertained." Sect. 7, sub-s. 2, provides that an allowance shall not be made in respect of debts due to persons abroad, except out of the value of personal property

situate abroad. Sect. 7, sub-s. 3, authorizes an allowance in respect of administering or realizing property situate abroad; and allows the deduction of foreign duty from the value of such property. Sect. 7, sub-s. 5, provides that the principal value shall be estimated at the price the property would fetch in the open market. Sect. 7, sub-s. 8, authorizes the executors to appoint a person to inspect and value the property. Sect. 8, sub-s. 3, requires the executor to specify in the accounts annexed to the Inland Revenue affidavit all the property on which estate duty is payable, and makes him accountable for the estate duty on all personal property wheresoever situate. All those sections impose duties upon the executors which they could not possibly discharge in respect of property in a foreign country and in no way under their control. So also s. 8, sub-ss. 4, 5, 6, provide for cases where the executor is not accountable, and require the persons to whom the property passes to account for the duty and to furnish, under a penalty, particulars which they could not possibly ascertain unless they had control of the property. Sect. 9, sub-s. 5, empowers a person authorized or required to pay estate duty in respect of any property to raise it by sale or mortgage. This clause is unmeaning unless it is confined to property under his control, and the definition of executor in s. 22, sub-s. 1 (*d*), as including a person who takes possession of or intermeddles with property also implies that the property would be under the executors' control.

We do not dispute that the beneficiaries will be liable to pay estate duty out of the American assets, if and when they get them over here. But the English executors are not liable to pay this duty out of the English assets. Suppose a testator domiciled in England with 400,000*l.* personalty in America and 100,000*l.* personalty in England makes an English will leaving 100,000*l.* to one son in England and an American will leaving 100,000*l.* apiece to four other sons in America. According to the Inland Revenue contention the English son would have to pay duty on the whole 500,000*l.*, though there is no possible means for him to recover the duty against his four brothers in America.

In the present case there are really two wills in one document. The matter must therefore be dealt with as if there were an

SWINFEN EADY J.
1911
MANCHESTER (DOWAGER DUCHESS), *In re.* DUNCANNON (VISCOUNT) *v.* MANCHESTER (DUKE).

English will and an American will in separate instruments. In former days the American will would have been included in the English probate, not for purposes of taxation, but to protect the English executors by shewing that they had nothing to do with the foreign assets: *In the Goods of Lord Howden.* (1) Under the present practice a copy would be filed in the registry: *In the Goods of Murray.* (2) As to different administrations in different countries, see Williams on Executors, 10th ed. pp. 1285-1290.

In Westlake's Private International Law, 4th ed. pp. 130, 131, the reasons for the distinction between probate duty and legacy duty are given thus: Probate duty was regarded as "the price of the protection afforded by the government to movable wealth, from which point of view it followed that the domicile of the deceased was irrelevant to it, but the situation of the property protected relevant." Legacy duty was "a toll taken by the government on the transmission of movable wealth from dead to living hands." The testator's domicil was therefore relevant, the situation of the wealth irrelevant. Legacy duty was not and is not payable on the property of a testator domiciled abroad: *Arnold* v. *Arnold.* (3)

In *Winans* v. *Attorney-General* (4) the testator was domiciled abroad, but estate duty was payable on bonds situate in England. Considerable light is thrown on the nature of the duty by that decision. The Crown argued that the estate duty was a tax on alienation and fell on foreigners because they enjoyed the protection of British law. And all the Lords founded their judgments on that ground, and that they enjoyed that protection because the property was situated here.

It is plain that probate duty would not have been payable in this case, and estate duty is therefore only payable if legacy duty is payable. Our contention is that legacy duty is not payable. In *In re Ewin* (5) foreign stock of a testator domiciled here was held liable to legacy duty, but stress was laid on the fact that the executors were administering the property here. In *Thomson* v.

(1) (1874) 43 L. J. (P. & M.) 26, 29.
(2) [1896] P. 65, 73.
(3) (1837) 2 My. & Cr. 256.
(4) [1910] A. C. 27.
(5) (1830) 1 Cr. & J. 151, 154, 157.

Advocate-General (1) it was no doubt held that the liability to legacy duty was determined by the testator's domicil, but Lord Campbell said (2) "you cannot say that the statute attaches upon"—the executor—"in respect of property over which it does not give him control."

[SWINFEN EADY J. That was only an observation during the argument. Tindal C.J. said (3): "The liability to legacy duty does not depend on the act of the executor in proving the will in this country, or upon his administering here." It depends simply on the testator's domicil.]

There is no English authority the other way, but in *Blackwood* v. *Reg.* (4) it was held that a Victorian statute imposing probate and legacy duty must be confined to property brought under the executor's control by virtue of the foreign probate. In *Wallace* v. *Attorney-General* (5) it was held that succession duty was not payable on legacies bequeathed by a testator domiciled abroad, because the legatees did not become entitled by virtue of the laws of this country. In the similar case of *Attorney-General* v. *Campbell* (6) it was held that the property was not originally liable to succession duty, but that when received and invested over here any subsequent devolution was liable to duty. Lord Westbury said, "you cannot apply an English Act of Parliament to foreign property whilst it remains foreign property." In the present case the English executors have no title to the American assets, and the beneficiaries can only claim them from the American executors in the American Courts under the American probate. This is surely a case in which the beneficiaries are only entitled under American law to property still American, so that neither legacy nor succession duty is payable. The entire absence of any machinery for assessing the value of foreign assets shews that the Legislature cannot have intended to tax those assets: *Colquhoun* v. *Brooks*. (7) We therefore contend that legacy duty on the American assets is not payable at all, and that in any case it is not payable by the English executors, who will never receive those assets.

(1) (1845) 12 Cl. & F. 1.
(2) Ibid. 6.
(3) Ibid. 19.
(4) (1882) 8 App. Cas. 82.
(5) (1865) L. R. 1 Ch. 1, 9.
(6) (1872) L. R. 5 H. L. 524, 531.
(7) (1889) 14 App. Cas. 493, 506.

SWINFEN EADY J.
1911
MANCHESTER (DOWAGER DUCHESS), *In re.*
DUNCANNON (VISCOUNT) *v.* MANCHESTER (DUKE).

Edward Beaumont, for the Duke's children. The case must be treated as if there were two wills. Now probate duty was confined to assets which the Crown enabled the executor to get possession of by the grant of probate. In other words the Crown gave a quid pro quo in return for the duty paid. Estate duty, though of wider area, is of the same nature as probate duty, and should be confined to property that the Crown can affect. In the present case the Crown can do nothing to assist the English executors to get the American assets, and is therefore not entitled to duty.

Austen-Cartmell, for the Inland Revenue Commissioners. There is no question whatever that estate duty is payable on the American assets, and that it is payable out of (inter alia) the assets in the hands of the English executors.

Sect. 1 imposes the tax in the most general terms possible. The only exceptions are those contained in the Act, including (inter alia) s. 2, sub-s. 2. Does the exception in s. 2, sub-s. 2, apply here? The test is this. Is any one accountable for legacy duty on the American assets? If any person whatsoever is accountable the exception is gone. Now property in England is liable to estate duty although the testator is domiciled abroad: *Winans* v. *Attorney-General.* (1) On the other hand, if the testator is domiciled in England, the Crown is entitled to legacy duty on his foreign personalty, though not brought over here: *Thomson* v. *Advocate-General.* (2) The only test is whether the will and legacy are a will and legacy within the meaning of the statute imposing the duty. No doubt in *In re Ewin* (3) there were expressions pointing to administration in England. But the place where administration is taken out is immaterial. Domicil is the only determining factor: *Attorney-General* v. *Napier* (4); *In re Tootal's Trusts.* (5) Again, however many testamentary instruments a man may leave they only constitute one will: *Douglas-Menzies* v. *Umphelby.* (6) The arguments based on the hypothesis that there were two distinct wills in this case are wholly fallacious. Legacy duty is therefore payable on the American assets, and estate duty is consequently

(1) [1910] A. C. 27.
(2) 12 Cl. & F. 1, 19.
(3) 1 Cr. & J. 151.
(4) (1851) 6 Ex. 217, 218.
(5) (1883) 23 Ch. D. 532, 541.
(6) [1908] A. C. 224, 233.

payable under s. 2, sub-s. 2. The testatrix was competent to dispose of the American assets. The English executors are therefore accountable for the duty under s. 6, sub-ss. 2, 3, but under s. 8, sub-s. 3, they are only liable to the extent of the assets received. The latter sub-section was passed to meet this very case. If the English assets were 10,000*l.* and the American 50,000*l.*, the English executors would be liable for the duty on 60,000*l.*, but only to the extent of the 10,000*l.* in their hands. There is nothing in the Finance Act, 1894, to limit the executors' accountability to the funds they are actually administering. They may have to pay duty on funds to which they get no title under the probate, e.g. property passing in default of exercise of a general power: see s. 22, sub-s. 2, clause (*a*). The Crown's right exists however difficult the recovery of the duty may be: *In re Tootal's Trusts.* (1) Sect. 8, sub-s. 4, only applies to cases where the executor is not accountable, e.g. property passing on the death of a life tenant, gifts inter vivos within three years of the death, or real estate. It has no application to the present case. The exact point was decided on October 31, 1911, by the Scotch Court in *In re Douglas, Lord Advocate* v. *Douglas's Executors.* The case is not yet reported, but the papers have been furnished to the Commissioners of Inland Revenue and can be handed up to your Lordship.

[SWINFEN EADY J. Suppose the amount of duty is equal to the whole of the property in England, are the English executors bound to pay the whole estate in duty and leave English creditors unpaid?]

The Crown must, I think, come first. There is no real hardship upon the other creditors, for they could obtain payment out of the American assets. Lord Gorell's judgment in *Winans* v. *Attorney-General* (2) shews clearly that the Court will introduce no exceptions to the universality of the rule that all property which passes on the death of a person is subject to estate duty, except those contained in the Act itself. The executors have by s. 8, sub-s. 3, to furnish accounts of all property, without exception, liable to duty. These accounts are to serve three purposes: (1.) to shew all property liable to estate duty for the purpose of

(1) 23 Ch. D. 532, 541. (2) [1910] A. C. 27, 38.

SWINFEN EADY J.

1911

MANCHESTER (DOWAGER DUCHESS), *In re.* DUNCANNON (VISCOUNT) *v.* MANCHESTER (DUKE).

fixing the rate of duty; (2.) to shew what property the executor is responsible for; (3.) to insure payment by the executor of the duty for which he is responsible. By the same section the executor is made accountable for the duty on all personal property wheresoever situate of which the deceased was competent to dispose at his death. Sect. 8, sub-s. 4, only makes other people accountable for property for which the executor is not accountable. A slight further distinction is introduced by s. 9, sub-s. 1, which makes a rateable part of the duty a charge on any property in respect of which it is leviable which does not pass to the executor as such, but this does not affect the executor's accountability.

In re Tootal's Trusts (1) shews that liability to legacy duty is not confined to cases in which the legacy is paid by the executors. The fallacy of the applicant's argument is that it assumes that the testamentary dispositions of the testatrix can oust the right of the Crown to a charge on the bulk of her property.

In *In the Goods of Lord Howden* (2) and *In the Goods of Murray* (3) the only question was what documents should be admitted to probate. *Blackwood* v. *Reg.* (4) was merely a question of the construction of a particular statute. In *Attorney-General* v. *Campbell* (5) a testator who was domiciled abroad gave money to trustees to invest in English Consols, pay the income to his sister for life, and then hold the fund in trust for his children. It was held that legacy duty was not payable on the testator's death because he was domiciled abroad, but succession duty was payable on the sister's death because the testator had created an English trust which involved a succession. It is no authority for confining legacy duty to such part of a domiciled Englishwoman's estate as happens to be administered in England.

On the true construction of the Estate Duty Act the American property is liable to estate duty because it would have been liable to legacy duty.

Astbury, K.C., in reply.

(1) 23 Ch. D. 532, 541.
(2) 43 L. J. (P. & M.) 26.
(3) [1896] P. 65.
(4) 8 App. Cas. 82.
(5) L. R. 5 H. L. 524.

SWINFEN EADY J.
1912
MANCHESTER (DOWAGER DUCHESS), *In re.*
DUNCANNON (VISCOUNT) *v.* MANCHESTER (DUKE.)

1912. Feb. 12. SWINFEN EADY J. Consuelo, Dowager Duchess of Manchester, died on November 20, 1909, domiciled in England, and this summons raises various questions as to the death duties payable on that event. She died possessed of personal estate in England of about 120,000*l.* and of personal estate in America, of which the details have not been put in evidence, but which is said to amount to upwards of 400,000*l.* By her will and codicil dated January 7, 1909, and October 28, 1909, she appointed English executors and trustees, and she also appointed three American gentlemen her executors as to any property for which it might be necessary for probate of her will to be taken out in America. The will was proved in England by the English executors on December 17, 1909, and in America by the American executors on June 8, 1910.

The question which has now to be decided is whether estate duty is payable in respect of the American personal property come to the hands of the American executors in America, and whether the English executors are liable for the payment.

By arrangement between the parties the Commissioners of Inland Revenue have been made parties to this summons, which is issued in an action to administer the estate of the deceased, and they submit to the jurisdiction in these proceedings.

It was contended on behalf of the beneficiaries under the will that the English executors would not receive, and had no means of ascertaining the extent or value of, the American assets, and that however wide the language of the Finance Act may be, a reasonable interpretation must be placed upon the words employed, and that although foreign assets bequeathed to English executors might be liable for duty, foreign assets not so bequeathed could not be liable. The question turns upon the proper construction of the Finance Act, having regard to well-established principles. By s. 1 estate duty is to be levied and paid upon the principal value of all property which passes on the death of every person dying after the commencement of Part I. of the Act save as thereinafter expressly provided. By s. 2, sub-s. 2, property passing on the death of the deceased when situate out of the United Kingdom shall be included only if under the law in force before the passing of the Act legacy or succession

SWINFEN EADY J.

1912

MANCHESTER (DOWAGER DUCHESS), *In re.* DUNCANNON (VISCOUNT) *v.* MANCHESTER (DUKE).

duty is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes. As the American personalty is situate out of the United Kingdom it is to be included for the purpose of estate duty if legacy or succession duty would be payable in respect of it. It is well established that whether legacy or succession duty is payable in respect of personal property depends upon the domicil of the testator, and is not affected by the question where the property may happen to be locally situate at the death. The case of *Thomson* v. *Advocate-General* (1) finally established this rule. Lord Brougham stated that that was considered to be a case in which there was a conflict of authorities, which made it highly expedient that it should be settled after the fullest and most mature deliberation, with the assistance of the judges. The judges were summoned, and the House unanimously, and in accordance with the opinion of the judges, held that legacy duty was payable on the estates of persons who died domiciled in Great Britain, wherever the property was locally situate at the time of the death; and conversely in the case of persons dying domiciled abroad, that, although they might have personal property in Great Britain at the time of the death, in contemplation of law that property is supposed to be situate in the country of the domicil, and does not come within the Act for the purposes of legacy duty. The question arose again in *Attorney-General* v. *Napier* (2), and it was held that the point was concluded by *Thomson* v. *Advocate-General.* (1) Upon this principle it was decided that where a British official on duty in India died there, not having acquired a domicil in that country, the whole of his property was liable to legacy duty here, although it was almost entirely situate in India at his death. Parke B. pointed out that the rule was put (in *Thomson* v. *Advocate-General* (1)) upon the great principle that personal property is to be considered as situate in the place where the owner of it is domiciled at the time of his death; and Alderson B. said: "The principle is this, that where a man is domiciled, there the personal property is to be considered as situate." *In re Tootal's Trusts* (3) is to the same effect.

(1) 12 Cl. & F. 1.

(2) 6 Ex. 217, 220, 222.

(3) 23 Ch. D. 532.

Now the Finance Act does not adopt, for the purpose of estate duty, the principle of the fictitious situation of personal property in the place of the domicil. All personal property physically situate in the United Kingdom at the death of the owner is liable to estate duty, even though the deceased was a foreigner domiciled abroad: see *Winans* v. *Attorney-General*. (1) The Finance Act in s. 2, sub-s. 2, recognizes the actual physical situation of personal property out of the United Kingdom, and includes it for the purpose of estate duty, only if legacy or succession duty would have been payable in respect of it. This question can only be solved by reference to the domicil of the deceased. The case of *Blackwood* v. *Reg.* (2) was relied upon by the beneficiaries; the actual decision, however, seems to have little if any bearing on the present case. The question involved was the true construction of a particular colonial statute. Sir Arthur Hobhouse said: "The essential question is whether the Victorian Legislature intended that a legal personal representative in Victoria should state accounts of all personal or moveable estate belonging to the deceased wherever actually situate, or only accounts of so much as comes under his control by virtue of his probate. That question must be decided by a careful examination of the statute itself." But later the following passage occurs: "There is nothing in the law of nations which prevents a Government from taxing its own subjects on the basis of their foreign possessions. It may be inconvenient to do so. The reasons against doing so may apply more strongly to real than to personal estate. But the question is one of discretion, and is to be answered by the statutes under which each State levies its taxes, and not by mere reference to the laws which regulate successions to real and personal property." The result is that the American personalty of the testatrix, who was domiciled here, must be included in the property passing on her death in respect of which estate duty is payable.

The next question is, What is the extent of the liability (if any) of the English executors for the estate duty on the American personalty? It was urged that they have not possession of the

(1) [1910] A. C. 27. (2) 8 App. Cas. 82, 91, 96.

SWINFEN EADY J.

1912

MANCHESTER (DOWAGER DUCHESS), *In re.* DUNCANNON (VISCOUNT) *v.* MANCHESTER (DUKE).

funds, or the means of compelling information about them, and can neither ascertain nor provide for the amount of the duty. By s. 6, sub-s. 2, of the Finance Act the executors of the deceased shall pay the estate duty in respect of all personal property wheresoever situate of which the deceased was competent to dispose at his death on delivering the Inland Revenue affidavit. Now the testatrix was competent to dispose at her death of the American personalty, and therefore the executor is under an obligation to pay the estate duty in respect thereof, subject, however, to the limitation upon his liability to be presently mentioned. Sub-s. 3 provides for the executor not knowing the amount or value of any property; he may undertake to bring in an account and pay the duties when the amount and value are ascertained. By s. 8, sub-s. 3, the executor is accountable for the estate duty in respect of all personal property wheresoever situate of which the deceased was competent to dispose, but is not liable for any duty in excess of assets received, or which but for his wilful default might have been received. There is thus no hardship on the executor; he is only liable to the extent of assets which he might receive and which would be available to satisfy his liability.

The right of the Crown to the duty and the limited liability of the executor to pay it are, in my opinion, free from doubt. In the case of assets abroad there may in some cases be difficulty in the Crown obtaining payment, but this does not affect the legal position. As was said by Chitty J. in *In re Tootal's Trusts* (1), "If an Englishman domiciled in England dies resident abroad, and no part of his assets are in England, and no probate or letters of administration are taken out in England, there may be great difficulty in asserting the Crown's right to duty, and inasmuch as foreign Courts will not enforce the revenue laws of this country, the difficulty may in some cases be insuperable. But the Crown's right cannot depend on the greater or less difficulty in pursuing the remedy."

I therefore determine that the executors are liable for the estate duties upon all assets which the testatrix was competent to dispose of, including the American personalty, to the extent of

(1) 23 Ch. D. 541.

the assets which come to their hands, or would so come but for their wilful default.

The same point which I have had to decide recently came before the Court in Scotland—*In re Douglas, Lord Advocate* v. *Douglas's Executors*, the papers in which case were produced by the Commissioners of Inland Revenue. It was decided on October 31, 1911, by Lord Cullen as Lord Ordinary in Exchequer Causes. The testator was domiciled in the United Kingdom and left two wills (which in law are only one testamentary disposition of his property), one dealing with his estate in the United Kingdom, which amounted to 289,045*l.*, and appointing British executors, and the other will disposing of his foreign estate, amounting to 57,492*l.*, and appointing foreign executors to deal with it. The British executors were held liable for the estate duty in respect of the deceased's foreign movable estate, which was being administered by the foreign executors. Lord Cullen said: "The qualification which Mr. Murray sought to attach to the section"—that was s. 6 of the Finance Act—"to the effect that the executor is only liable to account for the duty payable on the estate which has come into his hands or is within his title, is not expressed in it, and I do not see any sufficient ground for implying it. The words of the section seem to me to be quite absolute." I entirely concur in that view.

Feb. 20. A further question on the summons was whether the English executors were liable to pay settlement estate duty on the American personalty in the hands of the American executors.

Hon. E. C. Macnaghten, K.C., and *T. T. Methold*, for the English executors. The settlement estate duty on the American assets is simply a charge on those assets under the Finance Act, 1896, s. 19, and the English executors are not liable till they receive them. The duty was originally imposed by the Finance Act, 1894, s. 5, as a further estate duty. There was no special provision for its payment, and consequently the settlement estate duty on personal property of which the deceased was competent to dispose had to be paid by the executor on delivering the Inland Revenue affidavit under s. 6, sub-s. 2, and s. 8, sub-s. 3: *In re*

SWINFEN EADY J.

1912

MANCHESTER (DOWAGER DUCHESS), *In re.*

DUNCANNON (VISCOUNT) *v.* MANCHESTER (DUKE).

Webber (1); *In re Maryon-Wilson.* (2) In *In re Webber* (1) North J. held that the settlement estate duty must actually be borne by the residue, but this part of his decision was disapproved in *In re Maryon-Wilson* (2), where Lindley M.R. pointed out that it ought to be borne by the settled fund, and that the mistake had been corrected by the Finance Act, 1896, s. 19. He said "It may be conceded that the settlement estate duty is a charge on the settled fund, and that, so far as the Finance Acts are concerned, the executors have to pay it simply for facility of collection."

Now s. 19 of the Finance Act, 1896, not only corrects the mistake in *In re Webber* (1), but it makes entirely new provisions for the collection of settlement estate duty. Sect. 19, sub-s. 1, provides that "The settlement estate duty leviable in respect of a legacy or other personal property settled by the will of the deceased shall (unless the will contains an express provision to the contrary) be payable out of the settled legacy or property in exoneration of the rest of the deceased's estate." That is quite sufficient to correct the mistake in *In re Webber* (1) and restate the actual law under the Finance Act, 1894.

If this sub-section stood alone it might well apply only as between the beneficiaries, and the settlement estate duty would still be payable in the first instance by the executor on delivering the Inland Revenue affidavit. It would be a mere further estate duty, and the present point would be covered by the previous decision. But sub-s. 2 puts an entirely different complexion on the matter. It provides that "The settlement estate duty leviable in respect of any such legacy or property shall be collected upon an account setting forth the particulars of the legacy or property, and delivered to the Commissioners by the executor within six months after the death, or within such further time as the Commissioners may allow." Reading the two sub-sections together it is clear that quoad settlement estate duty the settled fund is completely segregated from the rest of the estate, and that the duty is only payable out of that fund, so that the provisions of s. 6, sub-s. 2, and s. 8, sub-s. 3, no longer apply to settlement estate duty. The settlement estate duty on the American assets is no longer in the category of estate duty. It is really put on the same footing as

(1) [1896] 1 Ch. 914. (2) [1900] 1 Ch. 565, 570, 571.

legacy duty on the American legacies, i.e., it is only payable out of the American assets received here.

[SWINFEN EADY J. Your argument would equally apply to an English settled fund.]

It would apply to any fund settled by the will so as to be outside the executors' control. But practically the case can only arise where there are foreign executors of foreign assets.

Astbury, K.C., and *Manby*, for the Duke and Duchess, adopted the same argument.

Edward Beaumont, for the Duke's children. The settlement estate duty on the American assets is payable out of those assets in exoneration of the rest of the estate. But if the English executors pay it out of the English assets, neither they nor the English beneficiaries have any means of getting this exoneration. It is impossible that the Legislature can have intended to impose this hardship on the English beneficiaries.

Austen-Cartmell, for the Commissioners. Sect. 19, sub-s. 1, of the Finance Act, 1896, was merely passed to make it clear that the settlement estate duty fell on the settled fund "in exoneration of the rest of the deceased's estate." It is simply a declaratory section with regard to the incidence of the duty as between the beneficiaries, and it in no way relieves the executor from his liability under s. 6, sub-s. 2, and s. 8, sub-s. 3, of the Finance Act, 1894.

Sect. 19, sub-s. 2, was passed to facilitate the collection of the duty. Under the Finance Act, 1894, s. 6, sub-s. 2, and s. 8, sub-s. 3, the executor had to pay settlement estate duty on delivering the Inland Revenue affidavit. This was highly inconvenient. The residue was not ascertained at that time. There might be voluntary debts which would be deductible in ascertaining the value of a settled share of residue for the purpose of settlement estate duty, but which could not be deducted on the affidavit for estate duty: see Finance Act, 1894, s. 7. Sect. 19, sub-s. 2, of the Finance Act, 1896, was passed to remedy this inconvenience and to allow the duty to be collected on a separate account, but beyond this it in no way altered the general provisions of the Finance Act, 1894. Settlement estate duty still remains a further estate duty. The executor is still accountable

SWINFEN EADY J.

1912

MANCHESTER (DOWAGER DUCHESS), *In re.* DUNCANNON (VISCOUNT) *v.* MANCHESTER (DUKE).

for the duty on personal property of which the deceased was competent to dispose. The account is still to be delivered by the executor, who is the only person accountable, but for convenience it is delivered at a later period when the residue is ascertained. Where the executor is accountable, no other person is liable for the duty. If, therefore, the English executors are not liable for the duty on the American assets, the Crown has no remedy except possibly by an action against the American executors.

There is no hardship on the English executors, as they are only liable to the extent of the assets received. The fact that the American assets are not under their control is immaterial. In *In re Webber* (1) North J. said that s. 8, sub-s. 3, of the Finance Act, 1894, required the executor to specify in appropriate accounts all the property on which estate duty was payable, "whether the property is under his control or not," and that he was accountable for the estate duty on personal property of which the deceased was competent to dispose, to the extent of the assets received, and that he was equally accountable for the settlement estate duty and was the person bound to pay it in the first instance. This is still the law. North J. only went wrong in holding that the duty must be borne by the residue, as he thought the executor had no means of recouping residue. But in the case of settled property passing to the executor as such he can of course recoup residue out of that property. In the case of property like foreign personalty for which he is accountable, but which does not pass to him as such, he can recover the duty from the trustees or owners of the property under s. 9, sub-s. 4, which provides that "If the rateable part of the estate duty in respect of any property is paid by the executor, it shall where occasion requires be repaid to him by the trustees or owners of the property." This section coupled with s. 8, sub-s. 3, affords complete protection to the English executors, who have to apply the English assets in paying settlement estate duty on the American assets.

Hon. E. C. Macnaghten, K.C., in reply.

SWINFEN EADY J. A further question upon this summons is whether the settlement estate duty payable in respect of the

(1) [1896] 1 Ch. 914, 921.

American assets ought to be paid by the English executors. The contention is that having regard to the true construction of s. 19 of the amending Act, the Finance Act, 1896, the settlement estate duty is payable only out of the settled property, that is the American property, and not out of the English assets, and therefore the English executors are under no liability to pay that duty and are not entitled to pay it.

The question really turns solely upon the true construction of s. 19 of the amending Act. It is not disputed that but for that amending Act and if the matter had rested upon the Finance Act, 1894, the duty would have been payable by the English executors, in accordance with my previous decision as to estate duty. But the two Acts must be construed together, and in order to determine the true construction of s. 19 of the Finance Act, 1896, one must have regard to the provisions of the Finance Act, 1894.

Now the Finance Act, 1894, imposed estate duty to be levied and paid upon all property, real or personal, settled or not settled, passing on death. Then an additional duty, called settlement estate duty, is imposed by s. 5, which provides that "Where property in respect of which estate duty is leviable,"—that is this case, because I have already decided that estate duty is leviable in respect of the American assets,—"is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property,"—that again is this case—"(*a*) a further estate duty (called settlement estate duty)" shall be leviable. Settlement estate duty is therefore a further estate duty.

Sect. 6, sub-s. 2, provides that "The executor of the deceased shall pay the estate duty"—that includes the settlement estate duty—"in respect of all personal property (wheresoever situate)"—that would include personal property in America—"of which the deceased was competent to dispose at his death, on delivering the Inland Revenue affidavit." This was property to which the testatrix was absolutely entitled and of which she was competent to dispose. Therefore down to that point the executor is bound to pay the settlement estate duty.

SWINFEN EADY J.

1912

MANCHESTER (DOWAGER DUCHESS), *In re.*

DUNCANNON (VISCOUNT) *v.* MANCHESTER (DUKE).

Sect. 8, sub-s. 3, provides that "The executor of the deceased shall, to the best of his knowledge and belief, specify in appropriate accounts annexed to the Inland Revenue affidavit all the property in respect of which estate duty is payable upon the death of the deceased, and shall be accountable for the estate duty in respect of all personal property wheresoever situate of which the deceased was competent to dispose at his death, but shall not be liable for any duty in excess of the assets which he has received as executor, or might but for his own neglect or default have received." This section includes settlement estate duty, and the executor is accountable therefor, though only liable to the extent of the assets he receives, or but for wilful default might receive.

Sect. 9, sub-s. 4, provides that "If the rateable part of the estate duty in respect of any property is paid by the executor, it shall where occasion requires be repaid to him by the trustees or owners of the property." Then there is a special provision with regard to the duty on real property. This section again includes settlement estate duty. Therefore, if the executor, being liable, has paid the settlement estate duty, a rateable part where occasion requires shall be repaid to the executor either by the trustees or by the owners of the property.

Down to that point I think it would be clear that the English executors would be liable to pay the settlement estate duty on the American assets, and would be entitled under s. 9, sub-s. 4, to recover the rateable part of the duty so paid from the persons taking the property by which the duty ought really to be borne.

True it is that in *In re Webber* (1) North J. had decided that the settlement estate duty must come out of the general estate, but in *In re Maryon-Wilson* (2) it was pointed out that was a mistake, and that the Finance Act, 1896, had corrected that mistake.

Now s. 19, sub-s. 1, of the Finance Act, 1896, provides that "The settlement estate duty leviable in respect of a legacy or other personal property settled by the will of the deceased shall (unless the will contains an express provision to the contrary) be payable out of the settled legacy or property in exoneration of

(1) [1896] 1 Ch. 914. (2) [1900] 1 Ch. 565, 570.

the rest of the deceased's estate." That sub-section has reference to all settled personal property wheresoever situate. It is not confined to property situate abroad. It equally extends to property situate in England. Again it says, "unless the will contains an express provision to the contrary." It is open to the testator to provide that the settlement estate duty shall not be borne by the settled property, but shall come out of the general estate. But "unless the will contains an express provision to the contrary" the duty is "payable out of the settled legacy or property in exoneration of the rest of the deceased's estate."

Now in my judgment the whole of that sub-section points to the ultimate liability for the duty, and the way in which it is to be borne as between the beneficiaries. It enables the testator to determine how the duty is to be borne. One would naturally find some such provision if it were a question as between the beneficiaries, but not, of course, if it were to affect the liability to the Crown. Again, it is to be payable out of the settled legacy or property "in exoneration of the rest of the deceased's estate." In other words, the duty is not charged solely on the settled property, but it is payable by one part of the testator's estate in exoneration of the rest of the estate in due course of administration.

In my opinion s. 19, sub-s. 1, merely corrects the mistake that had been made in the interpretation of the earlier Act. That was the way it was put by Lindley M.R. in *In re Maryon-Wilson*. (1) He said: "Kekewich J. treats this enactment"—i.e. s. 19—"as a recognition by the Legislature of the soundness of the reasoning which led to the decision"—i.e. *In re Webber*. (2) "I cannot so regard the enactment. It corrected a mistake, and so saved further litigation."

It was urged that at all events s. 19, sub-s. 2, made the matter clear because it provided that "The settlement estate duty leviable in respect of any such legacy or property shall be collected upon an account setting forth the particulars of the legacy or property, and delivered to the Commissioners by the executor within six months after the death, or within such further time as the Commissioners may allow."

(1) [1900] 1 Ch. 565, 570. (2) [1896] 1 Ch. 914.

SWINFEN EADY J.

1912

MANCHESTER (DOWAGER DUCHESS), *In re.* DUNCANNON (VISCOUNT) *v.* MANCHESTER (DUKE).

Now it may well be that sub-s. 2 supplied a defect in the earlier Act. There might be a difficulty in ascertaining the true amount of the settlement estate duty at the period of delivering the Inland Revenue affidavit. There might be voluntary debts. These would not be deducted in determining the value of the estate for the purpose of estate duty, but in ascertaining the value of the share of residue or the share settled by the will, the voluntary debts as well as the debts for value would have to be taken into account. Sub-s. 2, therefore, provides that settlement estate duty shall be collected upon a special account; but again, that account is to be delivered to the Commissioners "by the executor." It recognizes the executor as the person who, under the earlier Act, is the person made liable to pay the duty. There is no provision for making any beneficiary liable to that duty, because under the earlier Act the executor is made liable for it, and where the executor is accountable then the beneficiary is not accountable; the executor is accountable, but he may recover under s. 9, sub-s. 4, the rateable proportion from the trustees or owners of the property where occasion shall so require.

In my opinion the true effect of s. 19 is merely to regulate the incidence of the settlement estate duty as between the beneficiaries, and to provide for its more convenient collection on the account that has to be delivered by the executor, but, construing the two Acts together, the executor is liable for the settlement estate duty and is bound to pay it to the extent of all the assets which he receives or which, but for his wilful default, he might receive.

In these circumstances I must determine that the settlement estate duty in respect of the American assets must be paid by the English executors, whose liability is limited in the way I have mentioned.

Solicitors: *Rawle, Johnstone & Co.; Boxall & Boxall; Solicitor to Inland Revenue.*

J. R. B.
G. R. A.

SWINFEN EADY J.

1912

March 6.

In re EUSTACE.

LEE *v.* McMILLAN.

[1911 E. 557.]

Administration—Following Assets—Secured Creditor—Equitable Right - Delay not amounting to Laches.

Mere delay does not deprive a creditor of his equitable right to follow his deceased debtor's assets for payment of an existing debt.

The mortgagor of a freehold house died shortly after assigning the equity of redemption. Six months later the mortgagee was informed of the assignment and death, but as he received his interest regularly from the assignee he took no steps to realize his security or to enforce the mortgagor's covenant. After thirteen years the assignee made default, and the security was found insufficient. The mortgagor's estate had long since been distributed: —

Held, that the mortgagee was entitled to follow the mortgagor's assets for any deficiency on the security.

Principles stated in *Blake* v. *Gale* (1886) 32 Ch. D. 571, *Ridgway* v. *Newstead* (1861) 3 D. F. & J. 474, and *Leahy* v. *De Moleyns* [1896] 1 I. R. 206, followed and applied.

Decisions in *Blake* v. *Gale* and *Ridgway* v. *Newstead* distinguished on the special circumstances.

ACTION.

On February 4, 1882, Robert Eustace mortgaged a freehold house to the plaintiff for 700*l.* and covenanted to pay the principal and interest. The interest was payable on February 4 and August 4 in each year.

On August 20, 1897, the mortgagor conveyed the equity of redemption to the defendant McMillan in consideration of 200*l.* and the usual covenant for indemnity.

On August 30, 1897, the mortgagor died, having by his will, dated May 16, 1894, appointed the defendant McMillan and another person, who renounced, his executors and trustees, and having devised and bequeathed his residuary real and personal estate to his trustees upon trust to sell the same and out of the proceeds to pay his debts, funeral and testamentary expenses, and to hold the surplus on trust for his wife for her life, with remainder to his children the defendants McMillan and R. J. Eustace and two others in equal shares. The will was proved by the defendant McMillan on October 21, 1897.

SWINFEN EADY J.
1912
EUSTACE, *In re*, LEE *v.* MCMILLAN.

On February 15, 1898, the defendant McMillan sent the plaintiff a cheque for the interest due on February 4, and on February 17 she wrote informing him of her father's death and of the previous transfer to herself of the equity of redemption. She then continued to pay interest up to August 4, 1910, after which no interest was paid.

In the meantime part of the estate was sold and the debts other than the plaintiff's debt and certain mortgage debts on the unsold property were paid, and, the testator's widow having died on December 5, 1898, the rest of the property, consisting mainly of leaseholds subject to mortgages, was in September, 1899, divided in specie between the defendants McMillan and R. J. Eustace and the two other children. Some of these leaseholds were still held by the defendant R. J. Eustace.

On October 5, 1910, the plaintiff gave the defendant McMillan notice to pay off the mortgage, and on June 7, 1911, being still unpaid, he commenced a creditors' action for the administration of the testator's estate, asking to have the mortgage realized and any deficiency made good out of the testator's assets and a declaration that the defendants McMillan and R. J. Eustace were liable to account for assets received.

The two other children were not made defendants, as the plaintiff had been unable to trace them.

The defendant McMillan did not dispute the plaintiff's claim and was willing to act as executrix in the administration as the Court might direct.

The defendant R. J. Eustace alleged (inter alia) that the property comprised in the 700*l.* mortgage was valued shortly before the testator's death at 900*l.*, and submitted that if the plaintiff's security had become impaired by subsequent diminution in value, it was the result of the plaintiff's negligence and laches in not realizing the security at an earlier date, and it would be inequitable that he should be allowed to resort to the assets now held by the defendant R. J. Eustace.

He also alleged that he had executed considerable structural and other work on a leasehold house known as "Ceres" which was assigned to him in 1899 subject to a mortgage against which he indemnified the estate, and that he had sold that

house in 1901. He also alleged that he had purchased another leasehold house from the executrix for 194*l.*, and that he had also paid her 250*l.* in part satisfaction of a 900*l.* mortgage debt on this and five other leasehold houses assigned to him in September, 1899.

Hon. E. C. Macnaghten, K.C., and *Ribton*, for the plaintiff. The plaintiff has done nothing to deprive himself of his right to follow the assets. He received his interest from the proper hand up to August 4, 1910, and until default was made there was no duty or obligation on him to enforce his security. In *Blake* v. *Gale* (1) the mortgagees actively assented to the distribution of the assets knowing that the daughters' shares were to be applied in carrying on the farm on which they had a mortgage, so that the distribution was pro tanto for their benefit. Relief was therefore refused. In *Ridgway* v. *Newstead* (2) there was a mortgage of a leasehold brewery. It was not only a wasting security, but it was hazardous, as a large part of the value depended on the goodwill. Delay in realizing a security of that nature obviously prejudiced the beneficiaries, and on this ground relief was refused. These cases are fully discussed and distinguished in *Leahy* v. *De Moleyns* (3), where relief was granted twenty-nine years after the mortgagor's death. There are no special circumstances in the present case and the plaintiff is therefore entitled to follow the assets.

Edward Ford, for the defendant R. J. Eustace. The plaintiff has been guilty of delay and laches. Although on February 17, 1898, he was informed of the mortgagor's death, and of the previous transfer of the equity of redemption, he made no inquiry as to what was being done with the mortgagor's estate of which he was a creditor. He must have known it would be distributed in due course, and having taken no steps whatever to assert any claim against it he must be deemed to have tacitly assented to the distribution and relied on his security alone. It is not necessary to prove active assent. The right to follow assets is a purely equitable right: *Blake* v. *Gale* (4); and the

(1) 32 Ch. D. 571, 579, 581.
(2) 3 D. F. & J. 474, 486.
(3) [1896] 1 I. R. 206.
(4) 32 Ch. D. 571, 580, 581.

SWINFEN EADY J.
1912
EUSTACE, *In re.* LEE v. MCMILLAN.

tacit assent implied by the above facts renders it inequitable to enforce such a right thirteen years after the mortgagor's death.

Again the defendant R. J. Eustace expended considerable money on the leasehold house "Ceres" before he sold it. Another house he purchased from the executrix and also paid off part of the mortgage debt on that and five other houses assigned to him.

[SWINFEN EADY J. I cannot go into details now. Of course if he bought a house, he did not take it as part of the estate. He is only liable for the assets he received.]

The defendant McMillan did not appear at the hearing.

SWINFEN EADY J. This case is unfortunately only too clear. The plaintiff is a mortgagee. He alleges that the security is insufficient and claims to administer the mortgagor's estate and to follow the assets into the hands of the beneficiaries. The mortgage was made on February 4, 1882. The mortgagor sold the equity of redemption to the defendant McMillan on August 20, 1897, and died on August 30, 1897, having appointed her his executrix. Interest was paid up to August 4, 1910, after which no interest was paid. The mortgagor's estate has been distributed among the beneficiaries, including the executrix and the defendant R. J. Eustace.

The executrix does not dispute the plaintiff's claim, but the defendant R. J. Eustace contends that in the circumstances it would be inequitable to allow the plaintiff to follow the assets. But why would it be inequitable? Up to eighteen months ago the plaintiff received his interest regularly and there was no obligation on him to take proceedings to enforce his security. It is contended that he has been guilty of delay and laches. But it has often been pointed out that mere delay does not amount to laches.

In *Blake* v. *Gale* (1) Cotton L.J. said: "The question here is—are the circumstances sufficient to prevent the plaintiff from obtaining relief? I do not go into the question of delay, because delay alone (as was said by Lord Campbell in *Ridgway* v. *Newstead* (2)

(1) 32 Ch. D. 571, 578, 581. (2) 3 D. F. & J. 474, 485.

is not sufficient to prevent the creditor from asserting his right. There must be, to produce that effect, changes of position in the legatees during that period, or other circumstances which would make it inequitable to allow him to do so." Bowen L.J. said: "We have to look at the delay which has taken place, coupled with the circumstances under which it has taken place, in order to see whether or not the true inference to be drawn from such delay under such circumstances is that the party claiming the right either agreed to abandon or release his right, or else has so acted as to induce the other parties to alter their position on the reasonable faith that he has done so." A similar view was expressed by the Irish Court of Appeal in *Leahy* v. *De Moleyns.* (1)

Now in the present case there is nothing beyond delay. In *Blake* v. *Gale* (2) the mortgagees had actively assented to the distribution of the estate and in *Ridgway* v. *Newstead* (3) the position of the beneficiaries was altered and prejudiced by the conduct of the mortgagees in delaying the realization of a wasting brewery security. There are no special circumstances of that sort in the present case. It is alleged that the defendant R. J. Eustace expended money on the leasehold house called "Ceres" before selling it. That may be so, but it is immaterial, as he has only to account for the assets he received. It is also alleged that he bought one leasehold house from the executrix. If that is so he did not take it as part of the assets. I am not, however, dealing with matters of detail at present, but only with the general claim to follow the assets. I can see nothing to prevent the ordinary rule applying, and the plaintiff is therefore entitled to the relief he asks.

Solicitors: *Rye & Eyre; C. W. Dommett & Son.*

(1) [1896] 1 I. R. 206, 236. (2) 32 Ch. D. 571.
(3) 3 D. F. & J. 474, 486.

G. R. A.

WARRINGTON J.

1912

Feb. 2.

PRINTING MACHINERY COMPANY, LIMITED *v.* LINOTYPE AND MACHINERY, LIMITED.

[1911 P. 2399.]

Arbitration—Lease—Construction—Claim for Rectification—Question of Law—Arbitration Clause—Legal Proceedings—Application for Stay—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 4.

By a deed, dated in 1901, the plaintiff company leased its undertaking, business, and goodwill to the M. company for a term of twenty-one years, subject to certain powers of determination and renewal therein mentioned. The deed contained a proviso giving an option to the M. company and the L. company, or either of them, of purchasing the undertaking of the plaintiff company. The deed also contained an arbitration clause which provided that "any dispute, difference or question which may at any time arise between all or any of the parties hereto touching the construction, meaning or effect of these presents, or any clause or thing herein contained, or the rights or liabilities of the said parties respectively, or any of them under these presents or otherwise howsoever in relation to these presents shall be referred" to arbitration. In 1903 the M. company and the L. company agreed to amalgamate, and for that purpose they were respectively wound up, and a new company, the defendant company, was formed to take over their undertakings and assets. By a deed dated in 1905 and made supplemental to the deed of 1901, the defendant company was substituted for the M. & L. companies in the latter deed, and undertook the obligations and became entitled to the benefits of those companies under that deed. Questions having arisen with reference to the option to purchase given by the deed of 1901, the plaintiff company brought an action claiming by its writ (inter alia) (1.) a declaration that the option was void and of no effect; (2.) in the alternative, that is, if the option was not void, a declaration that in ascertaining the price to be paid for the demised premises on the purchase thereof under the option the value of a certain obligation should be taken on a particular footing; (3.) as an alternative to (2.), rectification of the lease.

On a motion by the defendant company under s. 4 of the Arbitration Act, 1889, that the proceedings in the action might be stayed in order that the questions raised therein might be referred to arbitration:—

Held, that the question as to rectification of the lease of 1901 was not one which fell within the arbitration clause.

Held, also, that the questions as to the construction of the option to purchase and rectification were so intimately connected that it was convenient that they should be dealt with together by the Court.

Held, therefore, that the application to stay the proceedings in the action must be refused.

MOTION.

By an indenture of lease dated February 27, 1901, and made

between the plaintiff company (thereinafter called the lessor company) of the first part, the Machinery Trust, Limited (thereinafter called the lessee company), of the second part, and the Linotype Company, Limited, of the third part, the lessor company demised unto the lessee company all the undertaking, business, goodwill, and all other property of the lessor company together with the right to manufacture and sell machinery, appliances, and other things as to which the lessor company then had or might thereafter acquire patents or patent or manufacturing or selling rights, and also the right to carry on the executive business of the lessor company in the name of the lessee company, to hold the premises thereby demised unto the lessee company from December 23, 1898 (the date of the incorporation of the lessor company), for the term of twenty-one years and eight days ending on December 31, 1919, subject to the powers of determination and renewal therein contained, and also to certain contracts and obligations of the lessor company, paying therefor yearly to the lessor company during the said demise the respective fixed and fluctuating rents as therein mentioned. The lease contained a proviso for the renewal thereof for twenty-one years at the end of every period of twenty-one years until December 31, 1997, and also a proviso that if the lessee company and the Linotype Company or either of them should on any 31st day of December during the currency of the lease be desirous of purchasing the premises thereby demised they should on giving the lessor company six months' previous notice in writing have an option of doing so on the terms therein mentioned.

The lease also contained an arbitration clause in the following terms :—" Any dispute difference or question which may at any time arise between all or any of the parties hereto touching the construction meaning or effect of these presents or any clause or thing herein contained or the rights or liabilities of the said parties respectively or any of them under these presents or otherwise howsoever in relation to these presents shall be referred to the arbitration of a single arbitrator if the parties so agree or otherwise of two arbitrators one to be appointed by the lessor company and the other by the lessee company and the Linotype Company or their umpire except in the case of any dispute

WARRINGTON J.
1912
PRINTING MACHINERY COMPANY, LIMITED v. LINOTYPE AND MACHINERY, LIMITED.

difference or question arising between the Linotype Company Limited and the Machinery Trust Limited when they shall appoint an arbitrator each and the lessor company shall have no voice or interest therein and such arbitration shall be regulated by the provisions in that behalf contained in the Arbitration Act, 1889, or any statutory modification or re-enactment thereof for the time being in force."

In 1903 the Machinery Trust, Limited, and the Linotype Company, Limited, agreed to amalgamate, and for that purpose the two companies were respectively wound up, and a new company, the defendant company, was formed to take over their undertakings and assets.

By an indenture dated March 22, 1905, and made between the Machinery Trust, Limited, and its liquidator of the first part, the Linotype Company, Limited, and its liquidator of the second part, the plaintiff company of the third part, and the defendant company of the fourth part, and made supplemental to the deed of February 27, 1901, the defendant company was substituted for the Machinery Trust and the Linotype Company in the latter deed and undertook the obligations imposed and obtained the benefits conferred upon those companies under that deed.

Questions having arisen between the plaintiff and defendant companies with reference to the option of purchase given by the deed of 1901, the plaintiff company, on November 16, 1911, issued the writ in the present action claiming (1.) a declaration that the option given to the Machinery Trust, Limited, and the Linotype Company, Limited, or either of them by the lease of February 27, 1901, to purchase the property demised thereby on any 31st of December during the currency thereof was void and of no effect; (2.) in the alternative, a declaration that in ascertaining the price to be paid for the demised premises upon a purchase thereof under the option the value to the plaintiff company of the obligation imposed by the lease upon the lessee company and the Linotype Company to enter into a new lease of the premises for twenty-one years at the end of every period of twenty-one years until December 31, 1997, must be taken into account and that the lease must be treated as being in effect a lease for ninety-nine years; (3.) in the alternative to (2.), rectification

of the lease; (4.) all necessary accounts and inquiries to ascertain the fluctuating rent now due and payable to the plaintiff company under the lease and payment of the amount found due; (5.) an injunction to restrain the defendant company from doing anything hostile to the interest of the plaintiff company and from acting contrary to the spirit of the lease; (6.) damages; (7.) further relief; and (8.) costs.

This was a motion by the defendant company that pursuant to s. 4 of the Arbitration Act, 1889, all proceedings in the action might be stayed, the matters in difference therein between the parties having been agreed to be referred to arbitration by the terms of the lease of February 27, 1901.

At the hearing of the motion the point was taken by the plaintiff company that the questions which had arisen were not any of them "disputes, differences, or questions" between all or any of the parties to the agreement to refer, but were questions which had arisen between the plaintiff company, which was, and the defendant company, which was not, a party to the agreement to refer, and therefore that the arbitration clause did not apply. Warrington J., however, held on the construction of the lease of 1901 and the supplemental deed of 1905 that the defendant and plaintiff companies had agreed that questions arising between them should be treated as questions arising between the parties to the lease of 1901.

The only matter on which the case calls for a report is with reference to the question whether the claims for the declaration of the construction of the lease and for its rectification were sufficient grounds for allowing the action to proceed. The arguments on the other points raised are accordingly omitted.

Gore-Browne, K.C., and *H. E. Wright*, for the defendant company. The proceedings in the action ought to be stayed. The deed of 1901 contains a full arbitration clause and the questions raised by the action can very well be determined by an arbitrator. "If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary Courts, then since that Act of Parliament was passed a prima facie duty is cast upon the Courts to act upon such an

WARRINGTON J.

1912

PRINTING MACHINERY COMPANY, LIMITED v. LINOTYPE AND MACHINERY, LIMITED.

agreement": per Lord Selborne L.C. in *Willesford* v. *Watson*. (1) The question what was the true agreement between the parties to the deed of 1901 falls within the clause. An arbitrator can perfectly well decide whether there has been a slip in carrying into effect the bargain between the parties, and if he finds there has been one he can rectify the document. Even questions of law may be referred to arbitration if the parties so agree. The action is premature. Some of the claims in the writ have reference to questions which have not yet arisen.

Upjohn, K.C., and *Rowland Rowlands*, for the plaintiff company. A question of rectification has arisen and that depends upon the evidence of the persons who negotiated the deed of 1901. That evidence may be lost if the question is not now determined by the Court. It is therefore a present question and the Court can make a declaratory judgment under Order xxv., r. 5. The claim for rectification is a bona fide one. The lease ought now to be construed as the plaintiff company is desirous of knowing its position and that of its members having regard to certain offers which have been made to purchase the shares of the latter. There is no question as to this claim being premature. A person is always entitled to bring an action to get rid of a cloud on his title. The question as to the validity of the option to purchase is a cloud on the plaintiff company's title. It is entirely a novel proposition to say that an arbitrator has power to rectify the instrument under which he is himself acting.

[WARRINGTON J. The parties may give him that power.]

If the deed of 1901 means what the defendant company contends it does the plaintiff company had a right to rectification as soon as it was signed. An arbitration clause is a clause by which the parties to the deed are deprived of the right of resorting to the ordinary tribunals for the determination of disputes which have arisen between them. Its construction ought not therefore to be strained to include matters which prima facie do not fall within it. In *Bonnin* v. *Neame* (2), which was a partnership action, the arbitration clause did not in terms include persons claiming through or under the partners, and Swinfen Eady J. refused a stay and allowed an action

(1) (1873) L. R. 8 Ch. 473, 480. (2) [1910] 1 Ch. 732, 738.

brought by mortgagees of the share of one of the partners to proceed.

The question of construction raised by claim 2 of the writ involves a serious question of law, and the Court has therefore a discretion as to whether it will allow the action to proceed: *Lyon* v. *Johnson* (1); *In re Carlisle* (2); *Bonnin* v. *Neame*. (3)

The questions of construction and rectification of the deed of 1901 are so intimately connected that it would not be right, it is submitted, to separate them by referring to arbitration the matters arising on the construction of the deed and leaving the action to proceed as to the question of rectification: *Turnock* v. *Sartoris*. (4)

The plaintiff company is willing to amend its writ by omitting claims 4, 6, and 7 without prejudice to its right to include them in any reference to arbitration between the parties.

Gore-Browne, K.C., in reply. It is contended that the question of the rectification of the deed of 1901 is outside the powers of the arbitrator, but, it is submitted, parties may, if they choose, by appropriate words provide for the reference of a question of rectification to an arbitrator. If that is so, then it is submitted that the terms of the arbitration clause in the present case are sufficiently wide to include such a reference.

[WARRINGTON J. You are proposing to submit to arbitration a question arising not on the written instrument but outside it.]

There is no reason why a competent lawyer should not be appointed as arbitrator.

Willesford v. *Watson* (5) is a very strong case in the defendant company's favour, and its authority has never been questioned. *In re Carlisle* (2) is always cited where there is only a point of law to dispose of. In *Bonnin* v. *Neame* (3) it was sufficient for the judge to dismiss the application on the ground that the parties required by the arbitration clause were not before him. Sect. 19 of the Arbitration Act appears to contemplate that questions of law should be referred to arbitration. The fact therefore that there is a point of law to be decided is not, it is submitted, a reason for withdrawing the case from arbitration.

(1) (1889) 40 Ch. D. 579.
(2) (1890) 44 Ch. D. 200.
(3) [1910] 1 Ch. 732.
(4) (1889) 43 Ch. D. 150.
(5) L. R. 8 Ch. 473.

WARRINGTON J.
1912
PRINTING MACHINERY COMPANY, LIMITED v. LINOTYPE AND MACHINERY, LIMITED.

WARRINGTON J. The present application is made by the defendant company under s. 4 of the Arbitration Act, 1889, that the proceedings in the action be stayed in order that the questions raised therein may be referred to arbitration. That section, which is very familiar to us all, reading it shortly, is this: "If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings . . . . apply to that Court to stay the proceedings, and that Court or a judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission . . . . may make an order staying the proceedings." It is perfectly plain, therefore, that the jurisdiction to stay proceedings in the action arises when those proceedings relate to matters agreed to be referred, and that where questions relating to matters agreed to be referred arise the Court has the duty of deciding whether there is sufficient reason for not allowing the matters to go to arbitration.

The facts in the present case are these: [His Lordship stated the facts and held upon the true construction of the deed of 1901 and the supplemental deed of 1905 that the plaintiff and defendant companies had agreed, as above stated, that all questions arising between them should be treated as questions arising between the parties to the deed of 1901. He continued:]

But then there comes a further question. The plaintiff company further submits that, at all events, one of the questions is one that does not come within the arbitration clause, not because the defendant company was not a party to the deed of 1901, but because it does not come within the description of the questions referred to arbitration. That particular question is the claim for rectification; and there, I think, the plaintiff company is right. It seems to me that a claim for rectification is not a claim in relation to the deed which it is sought to rectify. It is a claim which may result in dealing in a particular way with the deed; but it is a claim which is founded upon and has relation

to an agreement not expressed in the piece of paper or parchment on which the parties have sought to express the terms arrived at. It seems to me that it is not a question "touching the construction of these presents," nor touching the rights or liabilities of the parties "under these presents.' Nor, in my judgment, is it a question "in relation to these presents." It seems to me that it is a question in relation to something outside "these presents," as the result of determining which something may have to be done to "these presents." But that is merely incidental to the determination of the question; it refers to something outside of these presents. In my judgment, therefore, the claim for rectification of the deed itself is not one which falls within the arbitration clause.

Having come to that conclusion, is that a sufficient reason for refusing to stay proceedings in the action? Of course, it may be said that it is not a sufficient reason for staying proceedings so far as the other questions are concerned, because those questions do fall within the arbitration clause. But in my opinion in the present case it is a sufficient reason; and I think so from this consideration: one of the questions raised is a question of construction; and it is dependent on the result of that question of construction whether the claim for rectification will be raised or not. It seems to me that it would be absurd to give to an arbitrator the duty of determining a question of construction, and then, supposing the arbitrator determined that question against the plaintiff company, to let the matter come back to the Court to determine whether the agreement should be rectified or not. A question which on the claim for rectification must be decided is the question of construction, for until you have arrived at what the written document means, you cannot say whether it is or is not in accord with the antecedent agreement of the parties. It seems to me, therefore, that these two questions so hang together that if the one—the claim for rectification—must be decided by the Court, then it is, to say the least of it, more convenient that the other questions also should be decided by the Court.

The existence of this claim for rectification seems to me, therefore, to be a sufficient reason for refusing the application of

WARRINGTON J.

1912

PRINTING MACHINERY COMPANY, LIMITED v. LINOTYPE AND MACHINERY, LIMITED.

the defendant company at the present moment. Whether the mere fact that the first claim on the writ raises a question of law, and a serious question of law, as to the validity of the option contained in the lease, would of itself have afforded a sufficient reason, it is not incumbent on me to express an opinion. I have found in the other part of the case a sufficient reason, and I need therefore say nothing about that. On the whole, I think I must refuse to make any order at the present moment to stay proceedings in order that the questions may be referred to arbitration. But, inasmuch as there may be questions which, after the determination of the points I have mentioned, may be suitable to refer to arbitration, I think the best way is to refuse to make any order on the motion at the present moment, except to direct the motion to stand over and to come on with the trial of the action. There must appear on the face of the order the undertaking given on behalf of the plaintiff company to amend the writ by striking out claims 4, 6, and 7 without prejudice to its right to include them in any reference to arbitration between the parties, for which I now give leave.

Solicitors for defendant company: *Worthington Evans, Dauney & Co.*

Solicitor for plaintiff company: *W. P. Wheldon.*

W. I. C.

KINGSTON, MILLER & CO., LIMITED *v.* THOMAS KINGSTON & CO., LIMITED.

WARRINGTON J.

1912

Feb. 13, 14.

[1912 K. 7.]

Trade Name—Company—Similarity of Name—Deception—Right of Individual to trade in his own Name—Transfer of Use of Name to Company.

Although a person not bound by any contractual restriction can on leaving the employment of a limited company carry on a rival business in his own name notwithstanding that the use of it is calculated to cause confusion between his own business and that of his former employers, and although, having so carried on business and acquired a goodwill of his own, he can (it may be) transfer to a new company as incidental to that goodwill the right to use his name as a part of their registered name, he is not entitled immediately on leaving his employment to transfer the right to make such use of his name to a new company formed for the purpose of carrying on a rival business where such use is calculated to cause confusion, and it makes no difference that his name carries with it the reputation of personal qualifications which he places at the disposal of the new company.

Fine Cotton Spinners and Doublers Association v. *Harwood Cash & Co.* [1907] 2 Ch. 184, followed and applied.

Trial of action without pleadings.

The plaintiff company, by their writ, claimed an injunction to restrain the defendant company from using as their registered name the name of "Thomas Kingston & Co., Limited," or any other name so nearly resembling the registered name of the plaintiff company as to be calculated to mislead or deceive the public into the belief that the defendant company were the same company as the plaintiffs, and from issuing or publishing advertisements, circulars, or other documents under the name of "Thomas Kingston & Co., Limited," or any such other name, and from carrying on business similar to the plaintiffs' business under such name.

The plaintiff company was incorporated in 1897 to carry on the business of high-class caterers and ball-room furnishers, formerly carried on by the firm of Kingston & Miller. Miller died in 1905, and after his death John Samuel Kingston became sole managing director of the plaintiff company. He

WARRINGTON J.
1912
KINGSTON, MILLER & Co., LIMITED v. THOMAS KINGSTON & Co., LIMITED.

had two sons, Thomas Kingston and Robert Kingston, who became associated with him as assistants, and under an agreement in writing dated January 1, 1907, Thomas Kingston was actively employed in the business, at a salary, down to December 31, 1911. In 1911 Thomas Kingston applied to the plaintiff company for a rise in his salary, and this not being granted he endeavoured to get other employment. He got into touch with a Mr. Wheatley, a wine and spirit merchant, with whom he entered into negotiations with a view to forming the defendant company, and the defendant company was incorporated on December 29, 1911, under the name of "Thomas Kingston & Co., Limited," for the purpose of carrying on a similar business to that of the plaintiff company, one of the objects stated in their memorandum of association being to "secure and turn to account the services of Mr. Thomas Kingston as an expert caterer and ball furnisher."

On January 3, 1912, Thomas Kingston entered into an agreement with the defendant company whereby he was engaged as their managing director, and on January 4, 1912, the writ in this action was issued.

The plaintiff company called a number of witnesses the effect of whose evidence was that the plaintiff company was now generally known as "Kingstons" although formerly called "Kingston & Millers" or "K. and M." They also said that the similarity of the names of the plaintiff and defendant companies must in their opinion cause confusion, and had in fact already caused some confusion, in the mind of the public. The defendant company called no witnesses.

Cave, K.C., and *Lyttelton Chubb*, for the plaintiffs. The evidence of the plaintiffs' witnesses shews beyond question that the use of the name "Kingston" as part of the registered name of the defendants will cause confusion in the mind of the public between the two companies, and the plaintiffs are therefore entitled to an injunction according to the principles stated in *Tussaud* v. *Tussaud* (1), *Rendle* v. *J. Edgcumbe Rendle & Co.* (2), and *Fine Cotton Spinners and Doublers Association* v. *Harwood Cash*

(1) (1890) 44 Ch. D. 678. (2) (1890) 63 L. T. 94.

& Co. (1) The case might have assumed a different aspect if Thomas Kingston on leaving the employment of the plaintiffs had carried on a bona fide business so as to acquire a goodwill of his own, since, according to the dictum of Stirling J. in *Tussaud* v. *Tussaud* (2), he might under those circumstances have had a right to transfer to the new company the use of his name as part of their registered name as an asset of that goodwill, but the dictum of Stirling J. is clearly limited in that way. On the facts of the present case the goodwill to which the name of "Kingston" attached was the goodwill of the plaintiffs' business alone. [They also referred to the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 8.]

Clauson, K.C., and *Stamp*, for the defendants. The present case is novel and not covered by any direct authority. The plaintiffs are seeking to establish a monopoly in the use of the name "Kingston" as against the transferee from a person of that name to whom it represents a valuable asset arising out of his personal experience and reputation in the catering business. The first question in this class of case is whether the use of the name under the circumstances is calculated to mislead; if so, then prima facie the plaintiff is entitled to relief; but that prima facie title to relief is rebutted if a satisfactory explanation is given of the identity or similarity of name, as, for instance, where a man is honestly carrying on business in his own name, or where the name is a common word expressive of an article which both parties deal in: *Aerators, Ld.* v. *Tollitt.* (3) In the present case it is conceivable on the evidence that there may be some confusion caused by the similarity of names, but there is no suggestion of dishonesty and no evidence of deception or that the name "Kingston" has acquired a secondary meaning. The business in the present case is a personal business in the sense that it depends largely on the personal qualifications of the man who interviews the customers and superintends the catering, and Thomas Kingston's reputation gives to his own name a value which is quite independent of its connection with the plaintiffs' business. The character of the business distinguishes the present case

(1) [1907] 2 Ch. 184. (2) 44 Ch. D. 678.
(3) [1902] 2 Ch. 319.

WARRINGTON J.

1912

KINGSTON, MILLER & Co., LIMITED v. THOMAS KINGSTON & Co., LIMITED.

from *Tussaud* v. *Tussaud* (1) and *Fine Cotton Spinners and Doublers Association* v. *Harwood Cash & Co.* (2), in each of which cases the business was of an impersonal character and the name "Tussaud" or "Cash" had no independent value to the owner apart from its connection with an old-established business. The present case falls rather within the principle of *Aerators, Ld.* v. *Tollitt.* (3)

No reply was called for.

WARRINGTON J. The plaintiffs in this case are a limited company called "Kingston, Miller & Company, Limited." The defendants are a limited company called "Thomas Kingston & Co., Limited." Both the plaintiffs and the defendants carry on a business which I may shortly describe as that of caterers. The plaintiffs seek to restrain the defendants from using as their registered name "Thomas Kingston & Co., Limited," or any other name so nearly resembling the registered name of the plaintiffs as to be calculated or likely to mislead or deceive the public into the belief that the defendants are the same company as the plaintiffs, or from issuing or publishing advertisements, circulars, or other documents under the name of "Thomas Kingston & Co., Limited," or any such other name as aforesaid, and from carrying on any business similar to the business of the plaintiffs under the name of "Thomas Kingston & Co., Limited," or any other such name as aforesaid. The action is brought under a well-known rule of law which is stated in Lindley on Companies, 6th ed. at p. 153, as follows: "Any company trading in this country can restrain persons from registering another company to carry on a rival business under a name identical with or so like its own as to be calculated to deceive; so a company which has been already registered under such a name can be restrained from carrying on a rival business under it." It is under the second branch of that statement of the law that the present action has been brought, because in this case the defendant company has already been registered.

The facts are as follows. The plaintiff company was

(1) 44 Ch. D. 678. (2) [1907] 2 Ch. 184.
(3) [1902] 2 Ch. 319.

incorporated in the year 1897. The promoters of the plaintiff company were two gentlemen, Mr. John Samuel Kingston and a Mr. Miller. On the company's incorporation these gentlemen became the managing directors and they were in fact the persons who carried on and conducted the business of the plaintiff company. The business became and is very successful and a very well known business. In January, 1905, Mr. Miller died, and from that time Mr. John Samuel Kingston became the sole managing director. He had two sons, Thomas Kingston and Robert Kingston, and those two sons became associated with him as assistant managing directors. He as managing director did his best to bring his two sons before the customers of the company and others with whom they were brought into relation, no doubt with the view that ultimately when he might die, or desire to retire from business, his two sons might succeed him. The result naturally was that Thomas Kingston (who is the only one of the sons with whom I have to deal) became skilled in the business. He obtained a reputation amongst the customers and in that way won for himself qualifications which would be of great value to him in the event of his starting in business on his own account. On January 1, 1907, he entered into a written agreement with the plaintiff company by which their relations were regulated until the agreement expired on December 31, 1911. That agreement contained no stipulation preventing Thomas Kingston from starting in business on his own account after the termination of his employment by the company, but it did contain a stipulation that during the period of his employment he should do his best for the company itself. In the autumn of 1911 Thomas Kingston desired a very largely increased salary and expressed his desire to the plaintiff company. The company were not willing at the moment to grant such increase, and thereupon Thomas Kingston in association with a gentleman named Wheatley, a wine merchant, took steps to obtain the formation of a new company of which he should be the managing director, and which should on the termination of his service with the plaintiff company set up a business on their own account—a business similar to that in which Thomas Kingston had won his experience and his other qualifications. Accordingly on

WARRINGTON J.
1912
KINGSTON, MILLER & Co., LIMITED v. THOMAS KINGSTON & Co., LIMITED.

December 29, 1911, the defendant company was formed. It was incorporated under the name of "Thomas Kingston & Co., Limited," and its objects were expressed in the memorandum of association to be, so far as is material for the present purpose, "to carry on the trade or business of high class caterers and ball furnishers"—that being the business of the plaintiffs—and further, and this is important, "to secure and turn to account the services of Mr. Thomas Kingston as an expert caterer and ball furnisher." On January 3, 1912, Thomas Kingston entered into an agreement with the new company whereby he was engaged as their managing director; and on January 4 the writ in this action was issued.

Now the first question which I have to ask myself is this: Is the use of the name "Kingston" in the name of the defendant company calculated to mislead or deceive the public into the belief that the defendants are the same company as the plaintiffs? With regard to that I find on the facts that the plaintiff company is frequently referred to by people who employ them as caterers and ball furnishers by the short name of "Kingstons," and that that practice has become more common since the death of Mr. Miller in 1905, since which time the actual people with whom the customers have come in contact have been either Mr. John Samuel Kingston or one or other of his two sons—most frequently, as I gather, Mr. Thomas Kingston. Whatever may be the reason, the company, especially during the last few years, has come to be commonly referred to as "Kingstons," and I find without hesitation that the use by the defendant company of the name "Thomas Kingston & Co., Limited," is calculated to lead to the belief in the minds of many persons who might be minded to employ the plaintiffs that the company carrying on that business of "Thomas Kingston & Co., Limited," is the company of which the persons in question have heard. Now the company of which they have heard, though they have heard of it under the name of "Kingstons," is really the plaintiff company; and on the facts, therefore, I come to the conclusion, and I think the conclusion is inevitable, that the use by the defendants of the name "Kingston" is likely to mislead or deceive the public into the belief that the defendants are the

same company as the plaintiffs. If that is so, then prima facie the plaintiff company is entitled to succeed. But that does not quite exhaust the case, because, although the use of the name is calculated to mislead, it is possible to justify that use. Now one example of a sufficient justification is to be found in this. An individual who is not under any contractual restraint may start business on his own account and in his own name, and, if he does so, he is not liable to be restrained at the suit of another individual of that name or of a company of that name, notwithstanding that his carrying on his business under his own name may be calculated to mislead. Again it may be conceded for the purposes of the present case, though there is no actual decision but only dicta on the point, that if the individual of whom I am speaking has carried on a business in his own name, or with partners, and has acquired a reputation and a goodwill on his own account under that name, or under that name with the addition of the words "and company," or similar words, he may by selling the goodwill of that business to a company confer upon the company the right to use the name, as incidental to the goodwill which they have acquired. So also a third case upon which there is actual decision has arisen in *Aerators, Ld.* v. *Tollitt* (1), in which the company first starting in a particular business has taken as its name the name of the article which it supplies. In that case they cannot prevent another individual or another company from afterwards carrying on business in the supply of that article and from using the name of that article as his or their own name.

Now the argument which has been addressed to me is this: the defendants say that in the present case Thomas Kingston has that which is equivalent to the goodwill which a person may transfer to a company and may by such transfer give to that company the right to use his name. In my judgment there is a fallacy in that contention, and the fallacy lies in this. There is no doubt that Thomas Kingston did during his service with the plaintiff company acquire qualifications which were of value to himself, in case he afterwards started business on his own account, and which would be of value to any person who might

(1) [1902] 2 Ch. 319.

WARRINGTON J.
1912
KINGSTON, MILLER & Co., LIMITED v. THOMAS KINGSTON & Co., LIMITED.

employ him after he ceased to be employed by the plaintiff company; but he had nothing in the nature of a goodwill. So far as his exertions and his skill have contributed to the success of the business of the plaintiff company the advantage of that belongs to them. The goodwill or that part of their goodwill which is made up of the reputation of Thomas Kingston is their goodwill and not his. All that he has is a certain personal qualification attaching to the man himself, a qualification which he may make use of for his own benefit or which he may transfer to somebody else; but the name is not incident to that qualification in the sense that it can be transferred to a third person and give to that third person the right to use it regardless of the fact that it may mislead the public. In the present case Mr. Thomas Kingston is not carrying on business individually, nor is he transferring to the defendant company a goodwill of his own, and, as incidental to that, the right to use his name. What then is the law applicable to such a case as the present? I think it is stated by Joyce J. in the case of *Fine Cotton Spinners and Doublers Association* v. *Harwood Cash & Co.* (1) in the following words: "I consider, as the law stands at present, that a new company with a title of which the name 'A', for instance, forms part has not the natural rights that an individual born with the name of 'A' would have. I think, also, that such a company merely by registration does not acquire and incorporate the individual rights which its promoters may respectively have had to carry on business in their own names; and, further, I think that a person of the name of 'A' without transferring a business and goodwill cannot, by merely authorizing the promoters of a company to use his name as part of their title, confer upon such company a right to do so as against other people who would be damaged thereby." That passage in Joyce J.'s judgment seems to me to be exactly applicable to the facts of the present case. The defendants are not an individual bearing the name of "Kingston"; they do not by registration incorporate the right which Thomas Kingston had to carry on business in his own name; the person of the name of Thomas Kingston is not transferring any business and goodwill

(1) [1907] 2 Ch. 190.

of his own: he is merely authorizing the promoters to use his name as part of the new company's title. That being so, in my opinion the plaintiffs are entitled to ask the Court to give effect to my original finding, namely, that the use of the name "Kingston" is calculated to mislead, and to give effect to it by granting the injunction claimed. I think, however, that the proper form of the injunction will be, not to restrain the defendants from using as their registered name the name in question, but to restrain them from carrying on business under that name, or under any other such name as is described in the writ, and from issuing advertisements, circulars, or other documents under such name.

The injunction will be suspended for a week to enable the defendants to apply to the Registrar of Joint Stock Companies to change their registered name.

Solicitors: *A. C. Mead; Hanhart & Co.*

A. C.

REGENT'S CANAL AND DOCK COMPANY *v.* LONDON COUNTY COUNCIL.

[1911 R. 1961.]

Compulsory Purchase—Notice to Treat—Counter-Notice—Canal—"House or other building or manufactory"—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 92.

The words "other building" in the collocation "any house or other building or manufactory" in s. 92 of the Lands Clauses Consolidation Act, 1845, mean other building in the nature of a house although in ordinary language it would not be described as a house, and do not include the entire undertaking of the Regent's Canal and Dock Company.

Dictum of Brett L.J. in *Richards* v. *Swansea Improvement and Tramways Co.* (1878) 9 Ch. D. 425, 434, followed and applied.

MOTION.

Under the powers conferred by the London County Council (Tramways and Improvements) Act, 1910, which incorporates the Lands Clauses Acts, the defendants on September 8, 1911, served on the plaintiffs a notice to treat in respect of lands

WARRINGTON J.
1912
REGENT'S CANAL AND DOCK COMPANY v. LONDON COUNTY COUNCIL.

described in the schedule to the notice and coloured red on a plan thereto annexed. The lands were there described as "land and wall" and consisted of a narrow strip of land on the top of the northern embankment which separates the towing path of the canal from the adjoining land, including in that strip a wall which bounds the property of the plaintiffs, and also of portions of the approaches to a bridge over the canal known as the New North Road bridge on each side and at each end of the bridge including the walls. The narrow strip was required for the purposes of a street and tramway lines running parallel with that part of the canal, and the other portions for widening and reconstructing the bridge.

The lands were situate about four miles from the plaintiffs' dock at Limehouse. No part of the canal itself or of the towing path was comprised in the notice.

On November 15, 1911, the plaintiffs served a claim on the defendants claiming the sum of 822,000*l.*, the value of the land taken and the injury caused by such taking, and also giving notice that the lands formed part of a "building or manufactory, to wit, the Regent's Canal and the other works and lands appurtenant thereto," within the meaning of s. 92 of the Lands Clauses Consolidation Act, 1845 (1), and that they required the defendants, unless they were willing to pay the sum of 822,000*l.*, to take the whole of the said canal and other works and lands and appurtenances thereto comprised in the said building or manufactory, which they expressed themselves as willing and able to sell and convey, and for which they claimed the sum of 2,080,067*l.* 10*s.* 4*d.*

The defendants having expressed their intention of proceeding under their notice pursuant to s. 85 of the Lands Clauses Consolidation Act, 1845, the writ in this action was issued on December 19, 1911, claiming (1.) a declaration that the defendants were not entitled under the powers of the London County Council

(1) The Lands Clauses Consolidation Act, 1845, s. 92, provides that "no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory, if such party be willing and able to sell and convey the whole thereof."

(Tramways and Improvements) Act, 1910, to compulsorily acquire from the plaintiffs easements on the plaintiffs' land; (2.) a declaration that the defendants were not entitled to compulsorily acquire the lands comprised in their notice to treat without also taking the other lands which they were required to take by the plaintiffs' counter-notice; and (3.) an injunction to restrain the defendants, their servants and agents, from entering on the lands comprised in the defendants' notice to treat, or any of them, or from taking proceedings to obtain possession of the said lands or any further steps to assess the value of the same.

The plaintiffs now moved for an interim injunction in the terms of paragraph 3 of their claim.

The nature of the plaintiffs' undertaking was described by Mr. E. Clarkson, the secretary, in his affidavit as follows:—

"1. The undertaking of the plaintiffs consists of the Regent's Canal running from the Grand Junction Canal at Paddington to the Regent's Canal dock through which the canal communicates with the river at Limehouse.

"2. The dock is approached from the river by two locks, one known as the barge lock and a larger entrance known as the new ship lock.

"3. There are situate on the quays surrounding the Regent's Canal dock the South Quay warehouse, the Edward warehouses and the Alexandra warehouse, which are the property of the plaintiffs and are used by them in connection with the working of their said dock and canal, in addition to which there are several other buildings, the property of the plaintiffs, also used by the plaintiffs for the storage of goods in connection with the working of their said dock and canal.

"4. There are three jetties in the dock at which coal is discharged into lighters.

"5. The dock which was originally known as the Limehouse Basin was extended under the powers of the Regent's Canal Limehouse Basin Act, 1865.

"6. The said Limehouse Basin was used solely for the purpose of vessels discharging cargo into lighters for conveyance along the canal, but since its construction the dock has been used not only for the purpose of discharging goods into lighters

WARRINGTON J.

1912

REGENT'S CANAL AND DOCK COMPANY v. LONDON COUNTY COUNCIL.

to pass into the river but also for discharging goods which are stored in the warehouses above referred to.

"7. The plaintiff company handle in their docks year by year about 700,000 tons of goods and of this quantity about one half are transhipped in the dock for the canal, and consequently the canal and the dock are to a great extent interdependent.

"8. In addition to the buildings above referred to, there are at the dock the Victoria warehouse, several stores rented by independent firms, the dockmaster's offices at the pier head, a collector's office at the entrance to the canal, workshops in connection with the dock, a Customs and police office on the South-East Quay, and a large number of cranes on the quays and coal jetties.

"9. In addition to these buildings there is a stock-keeper's office at each lock along the whole length of the canal, and there are also pumping stations at a number of the locks. The plaintiff company also has a large number of wharves and warehouses along the banks of the canal. The towing path which runs on one side of the canal from one end to the other is supported by a wall throughout and the canal is crossed by a large number of bridges, the property of the plaintiffs.

"10. The said dock and warehouses and all the other buildings aforesaid together with the said canal form one undertaking."

The plaintiffs do not act as carriers, but the canal is open to the public on payment of the statutory tolls and rates.

Balfour Browne, K.C. (*Cave*, K.C., and *Boydell Houghton* with him), for the plaintiffs. We do not suggest that the land comprised in the notice is part of a "manufactory," but it is part of one continuous "building" within the meaning of s. 92, consisting of the dock, canal, towing path, embankment, and wall. There appears to be no direct decision upon the words "other building" in s. 92, but in *Long Eaton Recreation Grounds Co.* v. *Midland Ry. Co.* (1) a railway embankment was held to be a building other than a private dwelling-house. See too *Furniss* v. *Midland Ry. Co.* (2) [They also cited *Pinchin* v. *London and Blackwall*

(1) [1902] 2 K. B. 574. (2) (1868) L. R. 6 Eq. 473.

Ry. Co. (1) as shewing that the defendants had no power to acquire an easement over the plaintiffs' land.]

Morten, K.C. (*Sargant* with him), for the defendants. Under s. 92 the landowner must prove, first, that the land comprised in the notice is part of a "house or other building or manufactory," and, secondly, that he is able to sell and convey the whole. As to the first point, the words "other building," though, no doubt, including a structure not ordinarily described as a house, must be construed ejusdem generis with the word "house." In the language of Brett L.J. in *Richards* v. *Swansea Improvement and Tramways Co.* (2), it must be a building "in the nature of a house." According to this test it is impossible to say that the plaintiffs' whole undertaking is one building. The case of *Long Eaton Recreation Grounds Co.* v. *Midland Ry. Co.* (3) was a decision on the construction of a restrictive covenant and has no bearing on the true construction of s. 92. In *Furniss* v. *Midland Ry. Co.* (4) the question was whether the company were taking part of a manufactory. As to the second point, the plaintiffs have offered no evidence to shew that they are in a position to sell and convey the whole of their undertaking and the burthen lies on them; but we are prepared, if necessary, to shew that they are unable to do so.

Balfour Browne, K.C., in reply. In *Richards* v. *Swansea Improvement and Tramways Co.* (2) it is distinctly stated both by Brett L.J. and Cotton L.J. that each of the three things mentioned in s. 92—house, building, and manufactory—is different from the others; and see per Turner L.J. in *Lord Grosvenor* v. *Hampstead Junction Ry. Co.* (5) In that case land which, according to the original design, was intended to form the gardens of newly erected almshouses was held to form part of a "house" within s. 92, and the question was stated to be what would pass under the conveyance of the house. So here the question is what would pass under the transfer of the Regent's Canal, which is one continuous building from Limehouse to Paddington. As to the second point, namely, that the plaintiffs are unable to sell

(1) (1854) 5 D. M. & G. 851.
(2) 9 Ch. D. 425, 434.
(3) [1902] 2 K. B. 574.
(4) L. R. 6 Eq. 473.
(5) (1857) 1 De G. & J. 446, 453, 454.

WARRINGTON J.
1912
REGENT'S CANAL AND DOCK COMPANY v. LONDON COUNTY COUNCIL.

and convey the whole of their undertaking, this is not a question of evidence. No doubt the plaintiffs are a statutory creation, but the object of the Lands Clauses Consolidation Act, 1845, is to enable persons under disability to sell and convey pursuant to its provisions—see ss. 7 and 8—and the statement in the counter-notice that the plaintiffs are able and willing to convey is enough.

WARRINGTON J. stated the facts, and continued: The only question which I have to determine on this motion is whether the pieces of land which the defendants propose to take are part of a "building" according to the true construction of s. 92 of the Lands Clauses Consolidation Act, 1845. It has been suggested that the plaintiffs have not shewn that they are able and willing to convey the whole of their undertaking, and that, therefore, they have not brought themselves within that section, but I do not propose to deal with that question. I have not heard Mr. Morten in reply upon the point, but on the spur of the moment it seems to me that, although the plaintiffs may not have statutory powers to sell their whole undertaking and may be in the position of persons under disability, yet they may, if they are willing to convey, be able to convey by virtue of the provisions of the Lands Clauses Consolidation Act itself. However, I am not called upon to decide that question, because in my opinion I am bound to refuse the injunction on the ground that the pieces of land which the defendants propose by their notice to treat to take are not part of a "building" within the meaning of s. 92 of the Lands Clauses Consolidation Act according to the true construction of that section. There appears to be no express decision on the subject. The facts are stated for this purpose in an affidavit by Mr. Clarkson, the secretary of the plaintiff company, in which he says: "The undertaking"—the thing which the plaintiffs require the defendants to take—"consists of a canal running from the Grand Junction Canal at Paddington to the Regent's Canal dock at Limehouse." Then he describes how the dock is approached, and he describes the quays at the Regent's Canal dock and the warehouses and other buildings which are upon those quays. Then he describes the jetties and so forth in

the dock, and describes how the basin is used, and the very large traffic that there is upon the canal. Then he says that there are other warehouses and stores and so forth, and dockmaster's offices and collector's offices, and then, with regard to the canal itself, he merely says this: "The plaintiff company also have a large number of wharves and warehouses along the banks of the canal. The towing path which runs on one side of the canal from one end to the other is supported by a wall throughout and the canal is crossed by a large number of bridges, the property of the plaintiffs." Now it is not contended at the Bar that this undertaking comes under the expression "manufactory." It is not even suggested that it comes under the expression "house," although of course it includes a large number of houses. The argument is that it comes within the expression "other building," and no doubt in one sense it is a building. Every wall, whether a retaining wall, such as that which lines this canal, or a wall standing above the surface of the ground, is in one sense a building, but is it a reasonable use of ordinary language to say that the whole of the Regent's Canal with all its appurtenances is one building within the meaning of s. 92? I will read the words of Brett L.J. with regard to the construction of this section in the case of *Richards* v. *Swansea Improvement and Tramways Co.* (1) The Court was there dealing with a number of separate houses, and the question was whether those houses together made up a manufactory, so that the Court was not there dealing with precisely the same question as that with which I have to deal, but Brett L.J. did express a view with regard to the construction of this particular Act of Parliament on points which went rather beyond the actual point he had to decide, and he said this (2): "With regard to the construction of the Act of Parliament, in my opinion there are three different things treated of in that section of the Act. That which is treated of is premises, and there are three kinds of premises which are described. The first kind of premises described is a house; and that word has been held to mean not merely that which is a house in the ordinary sense, but a house both in the ordinary and legal sense; that is to say, it must be a

(1) 9 Ch. D. 425.
(2) 9 Ch. D. 434.

WARRINGTON J.
1912
REGENT'S CANAL AND DOCK COMPANY v. LONDON COUNTY COUNCIL.

house in the ordinary sense, but it may include more than a house in the ordinary sense, namely, that which is also a house in the legal sense, that is, the house and the curtilage and garden, and all that is necessary to the enjoyment of the house. The second thing which is described in that section seems to me that which is not in the ordinary sense a house, but a building which is in the nature of a house, although in ordinary language it would not be called a house. The third thing which is mentioned in the section is a manufactory, which may be a house, or may be a building, but which may be something more; that is to say, it may be more than one house, or more than one building, or it may consist of neither house nor building, but only of land used for a purpose of manufacturing. No part of that section is to diminish any other part. Each thing described is different from the others, and it is not circumscribed by the description of any of the others." Now I read that passage as meaning that, no doubt, a building is something different from that which is ordinarily called a house, but the Lord Justice did say—and in my opinion he was applying, if I may say so with all respect, the true principles of construction to the language—that the words "other building" used in that collocation meant something "in the nature of a house," although in ordinary language it would not be called a house. Applying that view to the present case, can anybody say that this canal is a building which, though not a house in the ordinary sense, is in the nature of a house? It is perfectly true that the undertaking as a whole comprises a number of structures which may be "buildings" according to the true construction of the Act of Parliament; but is the undertaking of the canal one "building" within the meaning of the Act? In my opinion it is nothing of the kind, and on that ground I hold that the present motion fails.

There will be the usual order when an application for an injunction is refused, that is to say, the defendants' costs will be part of their costs in the action.

Solicitors: *Coward, Hawkesley, Sons & Chance; Edward Tanner.*

A. C.

WARRINGTON J.

1912

Feb. 22.

In re SHIELDS.

CORBOULD-ELLIS *v.* DALES.

[1911 S. 3148.]

Will—Legacy—Subsequent Gift of Equal Amount—Ademption — Letter of Testator stating that Gift was instead of Legacy—Contents not communicated to Legatee in Testator's Lifetime—Evidence of Intention—Admissibility of Letter.

Testator by his will, dated in 1908, bequeathed a legacy of 300*l.* to D., his housekeeper and nurse. On April 15, 1909, he wrote a letter addressed to her, enclosing a cheque, in which he requested her to tell his executors that the cheque was instead of the 300*l.* left her by his will. The contents of the letter were not communicated to her, but the letter with the cheque were in her presence sealed up in an envelope and placed in a drawer by the testator, who called her attention to the matter and told her to open the envelope on his death. In December, 1910, the testator requested D. to get the envelope, and he opened it in her presence. He took out the cheque and put the letter without the cheque into another envelope, sealed it, and told her to keep it and open it on his death. He subsequently sent the cheque or another for a similar amount to his bankers with instructions to place the money to the credit of a joint account in the names of himself and D., with power to either party to draw, and this was accordingly done. The letter was opened and read by D. for the first time on the testator's death :—

Held, that there was nothing in the transaction to affect the conscience of D. and to preclude her from claiming both the legacy and the gift.

Held, also, that the letter of April 15, 1909, was not admissible in evidence to prove that the testator intended that the gift should be in substitution for the legacy.

Held, therefore, that D. was entitled to both the legacy and the gift.

Dictum of James L.J. in *Fowkes* v. *Pascoe* (1875) L. R. 10 Ch. 343, 350, followed.

Chapman v. *Salt* (1709) 2 Vern. 646; *Shudal* v. *Jekyll* (1742) 2 Atk. 516; *Hall* v. *Hill* (1841) 1 D. & War. 94; and *Kirk* v. *Eddowes* (1844) 3 Hare, 509, considered and explained.

ADJOURNED SUMMONS.

This was an originating summons taken out by the executors and trustees of the will of Frederic James Shields for the determination of the questions (1.) whether a sum of 300*l.* which at the date of the testator's death was standing to the credit of a joint account in the names of the testator and Sabina Dales at

WARRINGTON J.
1912
SHIELDS, *In re.* CORBOULD-ELLIS *v.* DALES.

the Manchester branch of Lloyds Bank Limited was the property of Sabina Dales or formed part of the testator's estate; and (2.) if the Court should determine that the said sum was the property of Sabina Dales, whether she was entitled in addition thereto to a legacy of 300*l.* bequeathed to her by the testator's will.

The testator by his will, dated August 12, 1908, after appointing executors and trustees thereof, bequeathed (inter alia) the following legacy:—"To Sabina Dales of Morayfield, Merton, aforesaid the sum of 300*l.*" Then, after bequeathing certain other pecuniary and specific legacies, the testator devised and bequeathed the residue of his estate both real and personal to his trustees upon trust for sale and conversion, and, after payment of his debts, funeral and testamentary expenses, and legacies, he directed them to invest the residue of the proceeds of sale and conversion in the investments for the time being authorized by law for the investment of trust funds and out of the resulting income to pay certain annuities and further legacies and to accumulate the surplus income as therein mentioned, and subject thereto to divide the capital and accumulated income equally between the China Inland Mission and the Southern Morocco Mission.

Subsequently to the date of his will the testator made a gift of 300*l.* to Miss Dales, who had been his housekeeper, nurse, and a faithful servant.

The following statement of facts as to the circumstances under which the gift was made is taken from the judgment of Warrington J.:—"On April 15, 1909, the testator wrote a letter which purports to be addressed to Miss Dales in these terms: 'In the distress that must follow my death it is my will that you should not have added the misery of poverty. Therefore herein is a cheque for 300*l.* (three hundred pounds) which I advise you at once to bank at the Wimbledon Bank. I think you will use it wisely, because you know how hard it has been earned. You will tell my executors that this is instead of the 300*l.* left you in my will; it will save you from death duties.' Then he tells her where his will is and who are the executors. That letter and a previous letter of April 4, 1905, to which it is not material to refer, and a

cheque for 300*l.* were in Miss Dales' presence sealed up in an envelope by the testator and placed in a drawer. He called her attention to it and told her to open the envelope on his death. At that date she did not know of the contents of the letter of April 15, 1909. She knew that there were a letter and a cheque in an envelope and that the packet was to be opened on his death.

"In December, 1910, the testator requested Miss Dales to get the envelope, and he opened it in her presence. He took out the cheque and put the two letters without the cheque into another envelope, sealed it, and told her to keep it and open it on his death.

"On December 10, 1910, he wrote a letter to the manager of the Manchester branch of Lloyds Bank Limited, who were his bankers, in these terms: 'I have seen so much of the mismanagement and postponements of trustees that I wish to give to my faithful housekeeper, who has cared for me in frequent long sicknesses for ten years past, the sum of 300*l.* now. I therefore enclose a cheque to that amount, desiring that you will send to her a cheque book at my address, the money to rest as a deposit account until my death and afterwards to be at her own disposal.' Then there is this postscript: 'In the event (unexpected) of Miss Dales' demise preceding mine—this 300*l.* is to revert to my account.' Whether the cheque enclosed in that letter was the cheque he took out of the envelope is uncertain, but that does not I think matter—it was for the same sum of money.

"On December 12 the manager wrote back making certain suggestions as to the mode in which the matter could better be carried out.

"There was some further correspondence between the testator and the manager, and the result was that by the testator's directions the 300*l.* was placed to a joint account in the names of the testator and Miss Dales with power to either to draw."

The testator died on February 26, 1911.

H. S. Preston, for the summons.

P. Vaughan (*Percy Wheeler* with him), for the China Inland

WARRINGTON J.
1912
SHIELDS, *In re.* CORBOULD-ELLIS *v.* DALES.

Mission, which had been appointed to represent all the residuary legatees. The legacy of 300*l.* was adeemed by the gift in the testator's lifetime of the 300*l.* Ademption of a general legacy in the testator's lifetime is a question of the testator's intention. The intention is usually presumed from the relationship between the parties or from a particular purpose appearing on the will. But even where the legatee is a stranger ademption may take place, and evidence is admissible to shew the testator's intention in making the subsequent gift: *Chapman* v. *Salt* (1); *Shudal* v. *Jekyll.* (2) There is a distinction between ademption of a legacy and revocation of a will, and parol evidence is admissible to prove the former though not the latter: *Hall* v. *Hill* (3); *Kirk* v. *Eddowes.* (4) *Fowkes* v. *Pascoe* (5) is, I admit, against my contention, but the distinction drawn by Lord Hardwicke in *Rosewell* v. *Bennett* (6), by Sugden L.C. in *Hall* v. *Hill* (7), and by Wigram V.-C. in *Kirk* v. *Eddowes* (8) between ademption of a legacy and revocation of a will was not brought to the attention of the Court, and their statements are mere obiter dicta.

On the facts proved, it is submitted that it is clear from the letter of April 15, 1909, that the testator intended to substitute the 300*l.* for the legacy.

J. E. Harman, for Miss Dales. There is no presumption in this case that the testator intended the gift of the 300*l.* to be in satisfaction of the legacy of 300*l.* This legacy is a general one, and the testator was neither the parent of nor stood in loco parentis to Miss Dales. The case therefore being one in which the Court does not raise any presumption, parol evidence is inadmissible to shew that the testator intended the gift to be in satisfaction of the legacy: *Hall* v. *Hill* (9); *Goodfellow* v. *Burchett.* (10) The letter of April 15, 1909, is therefore not admissible in evidence. To admit it would be to enable a legacy given by a will to be revoked by a document not executed as a testamentary instrument.

(1) 2 Vern. 646.
(2) 2 Atk. 516.
(3) 1 D. & War. 94.
(4) 3 Hare, 509, 516.
(5) L. R. 10 Ch. 343, 350.
(6) (1744) 3 Atk. 77.
(7) 1 D. & War. 117.
(8) 3 Hare, 520.
(9) 1 D. & War. 116.
(10) (1693) 2 Vern. 298.

Further, the contents of the letter never came to the knowledge of Miss Dales until after the testator's death. There is therefore nothing which is binding on the conscience of Miss Dales and precludes her in equity from asserting her title to the legacy: *In re Stead.* (1)

Very little principle can be extracted from either *Chapman* v. *Salt* (2) or *Shudal* v. *Jekyll.* (3) The former case is certainly not an authority for the proposition for which it is cited, and the decision in the latter case appears to have turned on certain statements made by the testator in his lifetime, the question being whether they were communicated.

[WARRINGTON J. referred to Roper on Legacies, 4th ed. p. 389.]

WARRINGTON J. The question in this case is whether Sabina Dales, a legatee for 300*l.*, is entitled to claim and receive her legacy and at the same time to insist on keeping a sum of money given to her by the testator in his lifetime. The facts are these: [His Lordship referred to the will and the death of the testator and stated the circumstances under which the subsequent gift was made as above set forth. He continued:] It is quite plain on the correspondence that the doctrine of a resulting trust is absolutely rebutted, and that the testator intended that if Miss Dales should survive him she should have this 300*l.* as her own. The only question is whether the gift to her of the 300*l.* is in lieu of the legacy or whether she is entitled to claim the legacy as well. The letter of April 15, 1909, was opened and read by Miss Dales for the first time after the death of the testator. The result is, therefore, that although it may be that the testator intended the deposit of 300*l.* to be instead of the legacy of 300*l.* left in the will, that fact was not communicated to the legatee in his lifetime. It was a clean gift unaccompanied by conditions. Under those circumstances the question arises whether the gift of the 300*l.* operates as an ademption of the pecuniary legacy. It is contended on behalf of the residuary legatees that it does so, and reference is made to two old cases, *Chapman* v. *Salt* (2) and *Shudal* v. *Jekyll* (3), and the judgments

(1) [1900] 1 Ch. 237. (2) 2 Vern. 646.
(3) 2 Atk. 516.

WARRINGTON J.

1912

SHIELDS, *In re.* CORBOULD-ELLIS *v.* DALES.

of Sugden L.C. in *Hall* v. *Hill* (1) and of Wigram V.-C. in *Kirk* v. *Eddowes*. (2)

First, with regard to the two old cases. *Chapman* v. *Salt* (3) is a most unsatisfactory case, and it is impossible to act upon it in deciding such a question as the present. The facts appear to be these. Mrs. Salt bequeathed 50*l*. to Mary the wife of Leonard Chapman. The will was made in 1700; afterwards the testatrix gave a note to Leonard Chapman for 50*l*. payable on demand, and a bill was brought for the recovery of the legacy. The report states that "By proofs it appeared, it was intended the note should be in lieu and satisfaction of the legacy." Whether that means that the giving of the note was so intended by both parties as to impose upon the conscience of the legatee a restriction against taking the legacy as well does not appear. The decision is concisely stated in these words: "A testamentary question. Evidence may be received. Dismissed the bill." What the nature of the evidence was does not appear.

The other old case is *Shudal* v. *Jekyll* (4), before Lord Hardwicke. It was a bill brought by a Mrs. Shudal for a legacy of 1000*l*. given to her by the will of Sir Joseph Jekyll, her uncle. It appeared that in 1738 the plaintiff's late husband was courting her and he applied to Sir Joseph Jekyll for his approval of the match. Sir Joseph Jekyll expressed himself satisfied, and said he would give him 500*l*., but as it was not convenient to let him have the money he would give him a note for 500*l*. payable on March 25, 1739, and he also said that he would leave something to his niece by his will. The question was whether the legacy of 1000*l*. was satisfied by the 500*l*. given upon the marriage in the testator's lifetime. The Lord Chancellor said that there were two questions, one whether there was a presumption of satisfaction, and he held there was none because Sir Joseph Jekyll did not stand in loco parentis and there was no ground on the doctrine of double portions or otherwise for presuming ademption of the legacy. He continued (5): "Secondly, if there is not a general presumption, then whether there is anything in the cause which

(1) 1 D. & War. 94.
(2) 3 Hare, 509, 516.
(3) 2 Vern. 646.
(4) 2 Atk. 516.
(5) 2 Atk. 517.

amounts to a proof that he intended it as a satisfaction. This must depend upon the note, and the evidence." This is cited to shew that parol evidence may be admitted to prove that a gift inter vivos is intended to be by way of ademption or in satisfaction of a pecuniary legacy. I think the proposition thus baldly stated is supported by the authorities. Parol evidence may establish a case equivalent to the ademption of a legacy. But in this particular case of *Shudal* v. *Jekyll* (1) the Lord Chancellor came to the conclusion that there was no evidence of any intention that the legatee was not to take both gifts. It is observable in that case that whatever evidence there was consisted of conversations between Shudal, the intended husband of the legatee, and the testator—not of any intention in the testator's mind not communicated to the parties concerned. It shews only that parol evidence may be admitted for the purpose of establishing that a pecuniary legacy has been adeemed.

The next case is a more modern one—*Hall* v. *Hill* (2), a decision of Sir Edward Sugden, when Lord Chancellor of Ireland. He says this: "As to the authorities themselves, I shall endeavour to class them, in order to see what their real import is. Some of the cases depend wholly on acts testamentary, whilst others depend on acts partly testamentary, and partly inter vivos. In the instance of a legacy and then an advancement, the first act is testamentary, and the second inter vivos. Let us first look at this class of cases; *Rosewell* v. *Bennett* (3) is an example of this class." I need not read the statement of that case at length. The Lord Chancellor does say this, quoting Lord Hardwicke: "'I am of opinion that this evidence ought to be read, and shall judge of the weight of it afterwards. The putting out the son a clerk in any of the offices is as much an advancement as putting him apprentice to a trade; and as this act of the testator, after making his will, is not a revocation of the will, but an ademption only of the defendant's legacy, I am of opinion that the plaintiff ought to be let into this evidence to show the testator's intention.' These words are, no doubt, ambiguous; but as the will was first and the advance afterwards, the parol evidence was admitted to

(1) 2 Atk. 516. (2) 1 D. & War. 94, 116.
(3) 3 Atk. 77.

WARRINGTON J.
1912
SHIELDS, *In re.* CORBOULD-ELLIS *v.* DALES.

explain the act of advancement, and not to construe the will. If a legatee under a will receives a subsequent benefit from the testator, which was intended to be in lieu of the former donation, the Court will naturally be anxious to prevent him from having both, and will accordingly admit parol evidence not to construe the will, but to explain the subsequent act, and thereby prevent the party from appropriating to himself what was never intended for him." I think there that the Lord Chancellor does again point out that parol evidence may be admitted in such a case for the purpose of preventing a person from appropriating to himself what was never intended for him; that is (as I think he means) a party who in fact is in good conscience precluded from taking something which was not intended for him, in other words, who knows that the first gift was intended to be in satisfaction and therefore that he could not in honesty take the second. I do not think, therefore, that the judgment of Sir Edward Sugden carries the matter any further than the judgment of Lord Hardwicke in the two old cases.

Now the fourth case which was relied on was the judgment of Wigram V.-C. in the well-known case of *Kirk* v. *Eddowes.* (1) It is a long case and I need not read the facts of it. He says: "Where similar questions have arisen upon gifts given by two distinct instruments, the law as to the admissibility of parol evidence has, I believe, been long since settled. In such cases the rule of law applies, that written instruments cannot be added to, or explained by, parol evidence; and, therefore, unless the second instrument, in express terms, or by presumption of law, adeems the gift made by the instrument of earlier date, no question can arise. Both instruments will take effect. Again, if the second instrument in terms adeems the gift by the first, it could not, I apprehend, be contended that it would not produce its intended effect; a party claiming under, and having taken the benefit of it, could not claim that benefit, and at the same time refuse to give full effect to it. If, however, the second instrument do not, in terms, adeem the first, but the case is of that class in which, from the relation between the author of the instrument,

(1) 3 Hare, 509, 516, 520.

and the party claiming under it, (as in the actual or assumed relation of parent and child), or on other grounds, the law raises a presumption, that the second instrument was an ademption of the gift by the instrument of earlier date, evidence may be gone into to shew that such presumption is not in accordance with the intention of the author of the gift; and, where evidence is admissible for that purpose, counter-evidence is also admissible. In such cases, the evidence is not admitted, on either side, for the purpose of proving, in the first instance, with what intent either writing was made; but for the purpose only of ascertaining whether the presumption which the law has raised be well or ill founded." Then he refers, among other cases, to *Hall* v. *Hill*(1), which I have already mentioned. To take that passage of the judgment, the Vice-Chancellor in dealing with the first class of cases where the general presumption does not arise is dealing with two instruments. He is not in terms dealing with a case of a transaction proved by parol only—I think the same principles will probably apply to the two classes of cases—but what he does say is that in the case which he is dealing with, namely, that of an instrument which in terms adeems the gift, "it could not, I apprehend, be contended, that it would not produce its intended effect; a party claiming under, and having taken the benefit of it, could not claim that benefit, and at the same time refuse to give effect to it." That is to say he is resting the case on the personal obligation imposed on the party who takes a benefit which he knows to be in substitution for another gift not to insist on receiving and retaining the latter. I think that that is the true explanation of the judgment of Wigram V.-C. as I think it is also the true explanation of the judgment in *Hall* v. *Hill*. (1) Wigram V.-C. refers to the discussion on the same subject in Roper on Legacies, 3rd ed. vol. i. pp. 341 et seq., and says, "The subject has been very elaborately considered by Mr. Roper. I cannot but think the learned writer has not sufficiently kept in mind the distinction between ademption and revocation, nor between the cases in which the intention of the parties has been reduced into writing, and those in which the Court has had to ascertain, by parol

(1) 1 D. & War. 94.

WARRINGTON J.
1912
SHIELDS, *In re.* CORBOULD-ELLIS *v.* DALES.

evidence only, what the parties had done. It was said, that there was a distinction in this case, inasmuch as the advance was made, not, as in the cases cited, to the legatee herself, but to the husband of the legatee. That circumstance might be material upon the question of implied ademption, but it cannot affect the question of admitting or rejecting the evidence to prove what the transaction was. In more than one of the cases cited the same circumstance occurred." I have looked at the discussion in Roper on Legacies. Roper cites the cases which have been referred to, and I think the result at which he arrives is that the mere evidence of what the testator desires is, if anything, the expression of an intention to revoke the gift in a will, and as such, unless it be a document executed with all the formalities required for the execution of a will, it cannot operate to revoke the provision in the will. I do not think he is dealing with the possibility of casting upon a legatee by parol evidence the personal obligation of having to refuse to accept a legacy.

The same remark applies to the dictum of James L.J. in *Fowkes* v. *Pascoe* (1): "But is it possible, consistently with established rules, to arrive at that result? In the first place, no parol evidence of such an intention is admissible, for such parol evidence would be to alter the written will." In that case there was no evidence of any intention to revoke the written will communicated to the legatee making it incumbent on her to refuse the legacy. I think that what James L.J. is saying is that mere evidence of the intention of the testator, if it amounts to anything at all, would be to alter the written will and therefore would not be admissible.

What I have to consider here is, first, whether there is anything in the transaction to affect the conscience of the legatee, and secondly, if there is not, whether evidence that the testator intended that the gift should be in substitution for the legacy is admissible. Upon the first question the legatee swears that she only knew of the contents of the letter after the testator's death. They were not communicated to her, and, so far as she is concerned, the gift was a clean gift unaccompanied by any conditions.

(1) L.R. 10 Ch. 343, 350.

The second question is one of law. Is there any authority which would justify me in admitting parol evidence to prove that the testator intended his executor not to pay the legacy? I do not think there is any such authority. The authorities only shew that parol evidence is admissible to prove that the transaction was intended to be an ademption, and by ademption is meant I think in this context a transaction to which the donee as well as the donor is a party. In my opinion, therefore, I should not be at liberty to read the letter of April 15, 1909.

The result is that, inasmuch as the testator's intention was not communicated to the legatee in his lifetime, she is entitled to the legacy notwithstanding the gift to her of the 300*l.*

Solicitors: *Corbould-Ellis & Mitchell; Donald McMillan & Mott; Sharp & Benest.*

W. I. C.

In re LLOYDS BANK LIMITED AND LILLINGTON'S CONTRACT.

[1911 L. 2510.]

Vendor and Purchaser—Open Contract—"Leasehold house"—Underlease—Property agreed to be sold forming Part only of Property comprised in Head Lease—Payment of Deposit—Repayment—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-s.* 3; *s.* 14.

A purchaser entered into an open contract to purchase a "leasehold" house and paid a deposit. It appeared on the face of the abstract of title that the property agreed to be sold was held upon an underlease and formed part of larger premises comprised in two head leases. The purchaser objected to the title on the ground that the property being so held she would be liable to eviction by the original lessor for breaches of covenant in respect of property not comprised in the underlease:—

Held, that a good title had not been shewn by the vendors to the property agreed to be sold, and that the purchaser was entitled to a return of the deposit.

Doctrine established in *Darlington* v. *Hamilton* (1854) Kay, 550, 558, and followed in *Creswell* v. *Davidson* (1887) 56 L. T. 811, applied.

VENDOR AND PURCHASER SUMMONS.

In June, 1911, Miss Love Elizabeth Lillington entered into a contract for the purchase from Lloyds Bank, Limited, of a

WARRINGTON J.
1912
LLOYDS BANK LIMITED AND LILLINGTON'S CONTRACT, *In re.*

leasehold house at Weymouth. The contract was contained in a document dated June 20, 1911, and signed by J. A. Broomfield as agent for Miss Lillington, and was in the following terms:— "I agree to purchase the leasehold house and premises situated and known as 'Hope Villa,' Cassiobury Road, Weymouth, (and now named 'St. Margarets') in the county of Dorset, for the sum of 250*l.*, (two hundred and fifty pounds) the payment for making up road and pathway to be included in the said amount. Also on condition that a good title be given. And I hereby agree to pay 10*l.* as deposit. Settlement to be made on or before the 25th day of June 1911." The deposit was paid on the following day.

Shortly after the date of the contract the purchaser was furnished with an abstract of title. The title disclosed by the abstract commenced with an indenture of lease dated February 5, 1895. That lease, which constituted the root of title, was in fact an underlease, as appeared on the face of it. It recited two indentures of lease, one a lease, dated February 10, 1890, to John Bagg of two pieces of land situate on the south side of a new road then about to be made and to be called Cassiobury Road for a term of ninety-nine years from December 25, 1889, at the eventual yearly rent of 3*l.* 3*s.* 4*d.*, and subject to the covenants and conditions therein contained, and the other a lease, dated February 10, 1890, also to Bagg, of another piece of land on the south side of the same road for a term of ninety-one and a half years from December 25, 1889, at the eventual yearly rent of 5*s.*, and subject to the covenants and conditions therein contained. By the underlease Bagg demised to William Vine "all those two pieces of land situate on the south side of a new road called Cassiobury Road which said pieces of land form parts of the pieces of land demised by the two hereinbefore recited indentures of lease" and were with the dimensions, &c., delineated and described in the plan drawn in the margin of the underlease, together with the messuage erected on one of the pieces of land. The habendum was to hold the premises as to the greater portion thereof unto Vine for the term of ninety-four years from December 25, 1894, less the last ten days thereof, and as to the remaining portion unto Vine for the term of eighty-six and a half years less ten days thereof, paying for the premises

thereby demised during the said term of ninety-four years less ten days the yearly sum of 10*l.*

By an indenture of assignment dated October 26, 1896, in consideration of 350*l.* Vine assigned to Bagg the premises comprised in the underlease of February 5, 1895, to hold unto Bagg for the residues of the two several terms of ninety-four years and eighty-six and a half years less ten days respectively, subject to the rent reserved by the underlease and the lessee's covenants and conditions therein contained.

By an indenture of mortgage dated April 14, 1898, Bagg demised to the Devon and Cornwall Banking Company, Limited, the premises comprised in the underlease for the residues of the terms of years then unexpired (less the last day of such terms respectively) by way of mortgage to secure the repayment of the sum of 450*l.* then due and further advances and interest, and he thereby declared himself a trustee for the bank of the last day of such terms.

By a deed poll dated April 16, 1906, and expressed to be supplemental to the deed of April 14, 1898, this mortgage was transferred to Lloyds Bank Limited, the present vendors.

On September 20, 1911, the purchaser's solicitors delivered their requisitions on title. The material requisition was requisition 9, which was as follows: "The property agreed to be sold forms parts of larger pieces of land comprised in certain head leases, and consequently the purchaser would be rendered liable to distress for rent for the whole premises comprised in the head leases, and also to eviction under the conditions of re-entry for breaches of covenant committed in respect of the remaining property. This fact was not stated in the contract or known to the purchaser. She therefore requires the vendors to obtain a release at their own expense."

This requisition was answered by the vendors' solicitors as follows: "We do not think the purchaser is entitled to make this requisition as under the Conveyancing Act, 1881, a purchaser is precluded from making any requisition respecting any document dated prior to the time prescribed by law for the commencement of the title which in this case would be the underlease of the 5th February, 1895. The purchaser however would be quite safe

WARRINGTON J.
1912
LLOYDS BANK LIMITED AND LILLINGTON'S CONTRACT, *In re.*

respecting the non-payment of the rents under the head leases which amount to 3*l.* 8*s.* 4*d.* as supposing she had to pay same she would be entitled to deduct any payment from the 10*l.* reserved by the underlease. The production of the last receipt for ground rent under the underlease would also show that the rents covenants and provisions of the head leases have been duly paid and performed up to that date."

The purchaser's solicitors being dissatisfied with this reply repeated requisition 9 in their further requisitions. The reply to the further requisition not being considered satisfactory, on November 22, 1911, the present summons was taken out by the purchaser asking (1.) that it might be declared that the requisitions and objections of the purchaser had not been sufficiently answered by the vendors and that the contract might be ordered to be rescinded; (2.) that the vendors might be ordered to repay to the purchaser the 10*l.* the amount of her deposit together with interest thereon at the rate of 4 per cent. per annum from June 20, 1911, until payment; and (3.) that the vendors might be ordered to pay to the purchaser her costs of investigating the title to the said leasehold house and of the present application.

The only matter calling for a report is with reference to the objection raised by requisition 9.

At the hearing a preliminary objection was taken on behalf of the vendors that the relief claimed by the purchaser could only be obtained in an action for rescission, but Warrington J. overruled the objection. A further point was also argued, namely, whether the purchaser, having agreed to purchase a "leasehold house," could be compelled to accept an underlease of the house. His Lordship, however, said that he did not propose to decide the point, but would assume in favour of the vendors that the words "leasehold house" included an underlease. The arguments on this point are therefore omitted.

J. F. W. Galbraith, for the purchaser. It is submitted that a good title to the property agreed to be sold has not been made out by the vendors. It appears from the abstract that what was sold was an underlease of property comprised with other property in two head leases. The effect of this, if the contract were carried

out, would be to subject the purchaser to the risk of distress and eviction for non-performance of covenants by persons over whom she has no control. That being the case, she is justified in declining to complete the purchase: *Darlington* v. *Hamilton*. (1) The doctrine established by that case has not been affected by s. 14 of the Conveyancing and Law of Property Act, 1881: *Creswell* v. *Davidson*. (2) The purchaser is not bound to accept an indemnity by the vendors against eviction for breaches of covenant committed by persons in respect of other parts of the property comprised in the head lease: *Fildes* v. *Hooker*. (3)

[He was stopped.]

Whitmore Richards, for the vendors. Assuming that the sale of the "leasehold house" in the contract mentioned includes an underlease of the house, a purchaser cannot object to the vendor's title on the ground that the head lease contains covenants with which the purchaser cannot comply; there is no distinction, it is submitted, where the underlease contains part only of the premises comprised in the head leases.

In *Hayford* v. *Criddle* (4) it was held that the fact that the property might become forfeited for non-compliance with a covenant in the original lease was not an objection to title.

[WARRINGTON J. The purchaser was there held to have known of that objection when he purchased. How is a purchaser precluded from taking the objection that the property sold is part of other property?]

By s. 3, sub-s. 3, of the Conveyancing and Law of Property Act, 1881, the purchaser is precluded from going behind the root of title—in this case the underlease—and he must be taken to have purchased with knowledge of all the objections to an underlease. *Darlington* v. *Hamilton* (1) is distinguishable; there what was sold was described as a "lease." In both that case and *Creswell* v. *Davidson* (2), as appears from the statements of facts, objection was also taken on the ground that the interest purported to be sold was a lease as distinguished from an underlease. *Fildes* v. *Hooker* (3) is also distinguishable. The

(1) Kay, 550, 558.
(2) 56 L. T. 811.
(3) (1818) 3 Madd. 193.
(4) (1855) 22 Beav. 477.

WARRINGTON J.
1912
LLOYDS BANK LIMITED AND LILLINGTON'S CONTRACT, *In re.*

contract there was for a lease, and at the time the case was decided an intending lessee was entitled to investigate the title of the lessor. The intending lessee in that case did so and found it to be defective. That is not the law now.

[WARRINGTON J. You must deal with *Creswell* v. *Davidson*.(1)]

That case is founded on *Darlington* v. *Hamilton* (2), and *Darlington* v. *Hamilton* (2) is not an authority for the proposition for which it is cited: see Fry on Specific Performance, 5th ed. pp. 650, 651. *Creswell* v. *Davidson* (1) is not referred to in the text-books. *Darlington* v. *Hamilton* (2) has not always met with approval: see *In re National Provincial Bank of England and Marsh.* (3)

[WARRINGTON J. What is the use of relief under the Conveyancing and Law of Property Act, 1881? The purchaser could only get it on the terms of her performing the covenants in head leases. Why should she have to perform other persons' covenants?]

The risk of eviction exists in the case of every under-lessee, and on the authority of *Hayford* v. *Criddle* (4) it is submitted that the mere fact that the underlease demises part only of the property comprised in the head leases is no more an objection than if the underlease had demised the whole of it.

As to the actual relief claimed, this is a case in which, although the vendors may possibly be unable to enforce specific performance of the contract, the purchaser cannot recover back her deposit.

J. F. W. Galbraith was not called upon to reply.

WARRINGTON J. This is a summons in the matter of a contract for the sale of a leasehold house by Lloyds Bank to a purchaser. The application is by the purchaser, and it asks, in effect, that it may be declared that the vendors have not made out a good title to the property sold and for the return of the deposit. The facts are these: [His Lordship read the terms of the contract, and, dealing with the title disclosed by the abstract, referred to the material provisions as abstracted of the under-

(1) 56 L. T. 811.
(2) Kay, 550.
(3) [1895] 1 Ch. 190, 197.
(4) 22 Beav. 477.

lease of February 5, 1895, and the deed of assignment of October 26, 1896, and continued :] Apparently the effect of the deed of October 26, 1896, was to merge the sub-term in the head term because Bagg was the original lessee. Whether the deed actually did so or not it is unnecessary for me to decide, but I will assume that it did not and will deal with the case as if the sub-term remained unmerged. The subsequent title consists of a mortgage by Bagg to the Devon and Cornwall Banking Company of the property comprised in the sub-term less the last day thereof and an assignment of that mortgage to Lloyds Bank.

The purchaser has taken two objections to the title. The first is that the term which the vendors propose to give is a sub-term, and the second is that the property agreed to be sold is comprised with other property in the head leases, and that the title of the purchaser, therefore, is liable to be defeated by eviction by the original lessor for breaches by other persons of their covenants.

As to the first point I do not propose to decide it, but will assume in favour of the vendors that a contract to sell a leasehold may be a contract to sell an underlease. Assuming that to be so, then the underlease which it is proposed to sell is an underlease of part only of the property comprised in the head leases.

The first objection by the vendors to the purchaser's requisition is that the purchaser is debarred from making it, and for this they rely on s. 3, sub-s. 3, of the Conveyancing and Law of Property Act, 1881, which provides that "A purchaser of any property shall not require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated, for commencement of the title, ... ; nor shall he require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title, is recited, covenanted to be produced, or noticed." The rest of the sub-section is not material to the present case. The first question is, is the requisition which has been made a requisition, objection, or inquiry with respect to a deed, will, or document, dated or made prior to the root of title, or a requisition

WARRINGTON J.
1912
LLOYDS BANK LIMITED AND LILLINGTON'S CONTRACT, *In re.*

as to title prior to that time? In my opinion it is not. It is an objection founded on that which appears in the description of the property agreed to be sold. The underlease itself in its operative part shews that the property sold is part of the property comprised in the two head leases. The fact is a fact relating to the actual title which the vendors propose to make. It seems to me, therefore, that the purchaser is not precluded from making the requisition.

Then is the requisition a good one? In my opinion it is. Suppose that there was an agreement to sell the property as held under the head leases and it appeared when the abstract of title was furnished that the property agreed to be sold formed part only of the property in the head leases, I should be of opinion then that the objection was a good one, because the title of the purchaser would be liable to be defeated by acts of persons over whom he had no control. It is idle to say that the purchaser in such a case would be entitled under s. 14 of the Conveyancing and Law of Property Act, 1881, to relief against forfeiture. I should have been of that opinion apart from authority. But I have the authority of a judge of co-ordinate jurisdiction with myself which is exactly in point, namely, the decision of Kay J. in *Creswell* v. *Davidson.*(1) In that case the plaintiff claimed specific performance of an agreement for the sale of a certain leasehold house and premises, No. 3A, Victoria Road, Kensington. It appeared from the abstract of title in that case that the plaintiff was entitled to an underlease of the premises in question which formed part only of the property comprised in the head lease—exactly the case with which I have to deal here. The defendant declined to perform his contract on the ground that the premises agreed to be sold were subject to the extra rent and covenants applicable to both houses under the original lease. The argument put on behalf of the defendant on that footing was that a holder of the underlease of No. 3A, Victoria Road would be, therefore, liable for any breach of the covenants, not only in respect of No. 3A but of No. 3 also, which was the other property comprised in the head lease. It was contended on behalf of the plaintiff that the modification of the right of the lessor

(1) 56 L. T. 811, 812.

with reference to ejectment by s. 14 of the Conveyancing and Law of Property Act, 1881, had rendered the objection one which could not be relied on. Kay J. deals with that point as follows: "It does not seem to me, therefore, that this provision of the statute has altered the law as laid down in *Darlington* v. *Hamilton* (1) in the least degree. It only postpones the right of the lessor to re-enter until after he has served on the lessee a notice specifying the particular breach complained of. I therefore consider that the plaintiff in this case is unable to make a good title to the property agreed to be sold to the defendant," and he accordingly dismissed the action. In that case not only did the learned judge not compel specific performance of the contract by the purchaser, but he held that the vendor had not made out a good title and had therefore himself committed a breach of the contract. *Darlington* v. *Hamilton* (2) there referred to is a decision of Wood V.-C. Two points were taken in that case; the first was that the purchaser could not be compelled to take an underlease of property described as a lease, and the second was that the property agreed to be sold was included in a former lease with other property and that that fact was not stated in the particulars of sale. Wood V.-C. said: "The lessor's title is involved with the title to other property. That objection has been attempted to be got rid of; but I do not think that it has been done so effectually as to prevent all danger of the vendor being ousted, at some time or other, on account of some breach of covenant in respect of the other property with which this is so connected. The facts should have been stated in the particulars, and expressly provided for by the conditions of sale, to enable the Court to enforce this contract." So in this case the vendors have chosen to enter into an open contract and have therefore only themselves to blame if they have not protected themselves by proper provisions in the contract. This is a sale under an open contract, and I decide both on principle and authority that the title made out by the vendors is not a good one.

Now the title not being a good one, the question is, what is the

(1) Kay, 550. (2) Kay, 558, 559.

WARRINGTON J.
1912
LLOYDS BANK LIMITED AND LILLINGTON'S CONTRACT, *In re.*

relief to which the purchaser is entitled? By her summons she asks that it may be declared that the requisitions and objections have not been sufficiently answered by the vendors and that the contract may be rescinded. I do not think the proper form is to order that the contract be rescinded. The proper form is, I think, to declare that the requisitions and objections have not been sufficiently answered by the vendors and that they have not made out a good title to the property agreed to be sold. I order the vendors to repay to the purchaser the deposit paid by her together with interest thereon at 4 per cent. from the date of the contract until repayment, and also to pay to her the costs of investigating the title and of the present application.

Solicitors: *Oppenheimer, Blandford & Co., for Andrews, Son & Huxtable, Weymouth; Wainwright & Co., for Tizard, George & Abbott, Weymouth.*

W. I. C.

NEVILLE J.
1912
March 1.

In re SEARLE.
BROOKE *v.* SEARLE.

[1910 S. 362.]

Landlord and Tenant—Tenancy "for two years certain and thereafter from year to year"—When determinable.

A demise "for two years certain and thereafter from year to year until either party" gives a three months' notice to determine the tenancy is not determinable at the end of the two years, but is a tenancy for three years at least, and only determinable by a notice expiring at the end of the third or any subsequent year.

ADJOURNED SUMMONS.

By an agreement dated June 12, 1909, and made between one Phillips (called the landlord) of the one part and William Searle (called the tenant) of the other part, the landlord agreed to let and the tenant agreed to take "for the term of two years certain from the 24th of June, 1909, and thereafter from year to year until either party shall give to the other three calendar months' notice of his determination to terminate the tenancy hereby

created" part of certain business premises in Hosier Lane, Smithfield, London, at the rental of 400*l.* per annum, payable quarterly on the usual quarter days.

By another agreement of the same date Phillips let to W. Searle certain offices, further part of the same premises, upon precisely similar terms, except that the rental was 80*l.* per annum payable quarterly.

William Searle died in December, 1909, and on February 21, 1910, on a creditors' originating summons the usual administration judgment was made. The defendant was the sole executrix and residuary legatee under the will of William Searle and carried on the various businesses of the testator under the direction of the Court until they were sold.

The defendant, under a notice from the mortgagees of Phillips, paid to them the quarterly rents under the agreements from September 29, 1910, to June 24, 1911. After September, 1910, a correspondence ensued between the solicitors of the defendant and the solicitors of the mortgagees with a view to a surrender of the tenancies after Christmas, 1910, the defendant's solicitors alleging that the tenancies would expire by effluxion of time on June 24, 1911, but the negotiations fell through. In February, 1911, the defendant vacated the premises, and on June 21, 1911, she sent the keys of the premises to the mortgagees on the footing that the tenancies expired that 24th of June. The mortgagees declined to accept the keys on the ground that the tenancies could not and did not expire by effluxion of time on June 24, 1911, and that the earliest date on which they could be determined was by a three months' notice expiring on June 24, 1912.

On October 20, 1911, the mortgagees took possession of the vacant premises under the proviso for re-entry in the agreements for non-payment of the quarterly rents that fell due on September 29, 1911, and subsequently made a claim against the testator's estate for 120*l.*, being the total of the quarterly rents falling due on September 29, 1911, and for 28*l.* 19*s.* 4*d.*, being mesne profits from September 29 to October 20, 1911, when they took possession. By arrangement the defendant took out a summons in the action to determine the question.

NEVILLE J. 1912 SEARLE, *In re.* BROOKE *v.* SEARLE.

Harman, for the defendant. On the construction of the agreements there is a tenancy for two years certain, and the tenant is entitled to go out at the end of that period without giving any notice: Woodfall's Landlord and Tenant, 18th ed. p. 393; *Thompson* v. *Maberly*. (1) But if notice were necessary, it is submitted that a sufficient notice was given in the correspondence. I rely on the word "certain" and the word "thereafter." *Doe* v. *Green* (2) may be cited against me, but it is distinguishable. There a tenancy "for one year and so on from year to year" until notice given was held to be a tenancy for two years at the least, but the words "and so on" imply a continuing tenancy, and the word "certain," which is the controlling word here, did not occur. The word "thereafter" contemplates a determination at the end of the two years, but if the tenancy is continued then there is to be a yearly tenancy determinable on the stipulated notice. In cases of master and servant it has been held that a contract of service for one year certain and to continue until notice given is a contract determinable at the end of the first year without notice: *Brown* v. *Symons* (3); *Langton* v. *Carleton* (4); and it is submitted that the analogy of those cases applies. It is true that in *Gardner* v. *Ingram* (5) Lord Coleridge C.J. questions *Thompson* v. *Maberly* (1), but it is an obiter dictum. The observations on the word "certain" in *Cannon Brewery* v. *Nash* (6) assist me. Here the notice to quit does not apply to the term certain, but to the uncertain term that may arise thereafter.

Hurst, for the mortgagees. I rely on *Doe* v. *Green* (2) and *Cannon Brewery* v. *Nash*. (6) This is a tenancy for three years at least and can only be determined at the earliest by a three months' notice expiring at Midsummer, 1912. A notice given to determine the tenancy at the expiration of the second year would be inoperative. *Thompson* v. *Maberly* (1) was cited in *Doe* v. *Green* (2) and is of doubtful authority. The analogy of the cases of contract between master and servant does not apply.

Harman in reply. *Cannon Brewery* v. *Nash* (6) was an attempt to turn out the tenant during the year certain, and does

(1) (1811) 2 Camp. 573.
(2) (1839) 9 Ad. & E. 658.
(3) (1860) 8 C. B. (N.S.) 208.
(4) (1873) L. R. 9 Ex. 57.
(5) (1889) 61 L. T. 729.
(6) (1898) 77 L. T. 648.

not decide that the tenant could not go out at the end of the year. *Thompson* v. *Maberly* (1) has never been overruled and is cited in the cases of master and servant.

NEVILLE J.
1912
SEARLE, *In re.*
BROOKE *v.* SEARLE.

NEVILLE J. In this case I think I am bound on the authorities to hold that a tenancy for two years certain and thereafter from year to year until either party gives a three months' notice to quit is not determinable at the end of the second year, but is a tenancy for three years at the least and is only determinable by a three months' notice expiring at the end of the third or any subsequent year. The claim, therefore, of the mortgagees must be allowed.

Solicitors: *Stanley Evans & Co.; Vincent J. Westlake.*

H. L. F.

PUGH *v.* RILEY CYCLE COMPANY.

PARKER J.
1912
Jan. 24, 25; *Feb.* 16.

[1911 P. 700.]

Copyright—Registered Design—Drawing shewing Conception as to Mode or Principle of Construction—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *ss.* 49, 60, 93.

A design in order to be registrable under s. 49 of the Patents and Designs Act, 1907, must be some conception or suggestion as to shape, configuration, pattern, or ornament, and be capable of being applied to an article in such a way that the article to which it has been applied will shew to the eye the particular shape, configuration, pattern, or ornament the conception or suggestion of which constitutes the design. The representation accompanying an application for registration must be something in the nature of a drawing or tracing, by means of which the conception or suggestion constituting the design may be imparted to others, so that persons looking at the drawing can form a mental picture of the shape, configuration, pattern, or ornament of the article to which the design has been applied; but a conception or suggestion as to a mode or principle of construction, though in some sense a design, is not registrable.

Inasmuch, however, as the mode or principle of construction of an article may affect its shape or configuration, the conception of such a mode or principle of construction may well lead to a conception as to

(1) 2 Camp. 573.

PARKER J.

1912

PUGH
v.
RILEY CYCLE COMPANY.

the shape or configuration of the completed article, and a conception so arrived at may, if sufficiently definite, be registered under the Act.

Quære, whether, where the conception thus arrived at is not a definite conception as to shape or configuration, but a conception only as to some general characteristic of shape or configuration necessitated by the mode or principle of construction, the definite shape or configuration being consistently with such mode or principle capable of variation within wide limits, the drawing is registrable.

A drawing was registered as a design in respect of vehicle wheels, the novelty in which was said to consist of the disposition of the tyre rim in relation to the hub and in the cross-sectional arrangement of three sets of spokes, such disposition and arrangement being shewn in the drawing, which was a cross-sectional drawing of a vehicle wheel on the longitudinal central plane—a conventional drawing such as would be used by an engineer to indicate how the wheel was to be constructed as regards the disposition of the wheel in relation to hub and the arrangement of the spokes—but the drawing did not shew what would in fact be seen if the wheel were cut on the longitudinal central plane. A competent mechanician could have easily constructed from the drawing a number of wheels whose configuration, from whatever standpoint they were looked at, would have little if anything in common except the disposition of the wheel in relation to the hub and the cross-sectional arrangement of the spokes. On the other hand, from each and every wheel so constructed a draughtsman, with a competent knowledge of the conventions of mechanical drawing, if asked to draw a cross-section on the longitudinal central plane shewing this disposition of the rim in relation to the hub and the cross-sectional arrangement of the spokes, would inevitably (without actually cutting the wheel) arrive at the drawing in question.

In an action by the owner of the registered design for an alleged infringement, a drawing of the machines made by the defendants, which were alleged to be infringements of the registered drawing, shewed differences from the registered drawing, which, judging by the eye alone, were substantial differences, as a person looking at the drawings would see that the cross-sectional arrangement of the spokes was not substantially the same in each unless he had in his mind a mode of construction rather than a conception of shape or configuration, and would not say that there was an imitation unless he were judging both drawings by the method of construction involved rather than by the appearance they presented to the eye :—

Held, therefore, that either the registration was bad as an attempt to protect a mode of construction, or that there had been no infringement, and that the action failed.

IN 1909 the plaintiff obtained a grant of letters patent (1587 of 1909) for improvements in wire spoked wheels. On May 11, 1909, before leaving the complete specification at the Patent Office, he registered as a design (No. 541,916) under s. 49 of the Patents and Designs Act, 1907, a drawing shewing the

disposition of the hub in relation to the rim, and the cross-sectional arrangement of the spokes, in a triple spoke wheel. This drawing was subsequently embodied in his complete specification as illustrating one variation of his invention, and he also registered as designs under s. 49 three other drawings to cover other variations. He subsequently entered into negotiations with the defendants with a view to their taking a licence under the letters patent and registered designs. In the course of these negotiations the plaintiff supplied the defendants with one of the patented wheels, and he alleged that the defendants had copied this and sold wheels of the same design, and that they had in their possession or power wheels for motor vehicles to which the design or a fraudulent or obvious imitation thereof had been applied without the plaintiff's consent. In the present action the plaintiff claimed (1.) an injunction to restrain the defendants, their servants, agents, and workmen, from manufacturing, selling, offering for sale, or in any manner dealing with wheels for motor vehicles to which the design numbered 541,916 of 1909, or any fraudulent or obvious imitation thereof, had been, without the plaintiff's licence or written consent, applied, and generally from infringing the plaintiff's design; (2.) damages, or, at the plaintiff's option, an account of profits; (3.) delivery up, on oath, for destruction, of the wheels in the defendants' possession which were infringements.

The defendants by their statement of defence denied that they had applied or caused to be applied the alleged design or any imitation thereof to wheels for motor vehicles, or that they had published or exposed for sale or sold wheels for motor vehicles to which the alleged design or any imitation thereof had been applied; and they said that the alleged registration was not proper subject-matter for a valid registration under the Patents and Designs Act, 1907, and further that the alleged registration was neither new nor original at the alleged date thereof.

The drawing deposited as the registered design is fully described in his Lordship's judgment, and was a cross-sectional drawing of a vehicle wheel on the longitudinal central plane. (1)

The action was tried on January 24 and 25, 1912.

(1) The drawing, at a first glance, somewhat resembled an aeroplane.

PARKER J.
1912
PUGH
v.
RILEY CYCLE COMPANY.

Astbury, K.C., and *Robert Frost*, for the plaintiff. The action is brought to restrain the defendants from infringing the plaintiff's registered design, consisting mainly of the representation of an arrangement of the spokes of wheels for cycles and motors, the arrangement being calculated to strengthen the wheel. The novelty consists in the disposition of a tyre rim in relation to a hub and in the cross-sectional arrangement of the spokes. An inventor may either take out a patent or draw and register a design. The Court must not go entirely on what is seen in the drawing. Some configurations could not be accurately shewn in a paper drawing. What is to be regarded is the mental conception which is indicated as nearly as possible by the drawing. The section of the plaintiff's wheel now produced shews the arrangement of the spokes. There are three lines of spokes; and the drawing shews their arrangement as it appeared in the section. The plaintiff also patented the improvements he had made in this disposition and arrangement. The defendants' managing director asked for one of the plaintiff's wheels, and said he wanted to take a licence to manufacture such wheel, and afterwards declined to take a licence, but copied the wheel. If, working out wheels, he had arrived at a similar result, the plaintiff could not have complained, but the defendants' wheel was a dead copy of the plaintiff's wheel which was sent to their managing director. By s. 60 of the Patents and Designs Act, 1907, during the existence of copyright in any design it is unlawful for any person, for the purposes of sale, to apply to any article in any class of goods in which the design is registered "the design, or any fraudulent or obvious imitation thereof, except with the licence or written consent of the registered proprietor." Although the design must be something which must appeal to the eye, the person registering it is not bound to give, beyond compliance with the rules, any statement of the ambit of that which he claims, but has to produce a pictorial illustration of the idea or suggestion which he has to establish as new or original: *In re Bayer's Design.*(1) There must be, in other words, a mental conception expressed in a

(1) (1906) 24 Rep. Pat. Cas. 65, 80; affirmed on appeal sub nom. *Bayer* v. *Symington* (1907) 25 Rep. Pat. Cas. 56.

physical form which has not existed before, but has originated in the constructive brain of the proprietor of the design: *Simmons* v. *Mathieson & Co.* (1) The design is not the article itself, but the conception, suggestion, or idea of a shape, picture, device, or arrangement which is to be applied to the article by some one of the means mentioned in the definition clause (s. 93): *Dover, Ld.* v. *Nürnberger Celluloidwaren Fabrik Gebrüder Wolff* (2); *Gramophone Co.* v. *Magazine Holder Co.* (3); *Hecla Foundry Co.* v. *Walker, Hunter & Co.* (4) There may be infringement by an article which is not exactly identical with the design: *M'Crea* v. *Holdsworth.* (5) The design need not observe the nicety required in the case of a patent: *Holdsworth* v. *M'Crea.* (6) [They also referred to *Werner Motors, Ld.* v. *A. W. Gamage, Ld.* (7); *Barran* v. *Lomas* (8); *Grafton* v. *Watson* (9); *Sherwood & Cotton* v. *Decorative Art Tile Co.* (10)]

A. J. Walter, K.C., and *Colefax*, for the defendants. The plaintiff's drawing is faulty from first to last. It is only a conventional drawing and not such a design as the Act requires. It has no relation to the article except as regards one feature. One cannot see in the article itself the spokes shewn in the drawing, which is a mere engineering drawing. The drawing must be looked at from a picture point of view, and a picture of a cross-section is not sufficient. The system of registering designs is a vast muddle, and the Courts ought to be strict in seeing that persons comply with the statutory requirements on registration. *In re Bayer's Design* (11), *Hecla Foundry Co.* v. *Walker, Hunter & Co.* (4), and *Werner Motors, Ld.* v. *A. W. Gamage, Ld.* (7) are really authorities in the defendants' favour. A drawing which shews merely a process of manufacturing is not registrable as a design: *Moody* v. *Tree.* (12)

(1) (1911) 28 Rep. Pat. Cas. 486, 491.
(2) (1910) 27 Rep. Pat. Cas. 498, 503.
(3) (1910) 27 Rep. Pat. Cas. 152, 159.
(4) (1889) 14 App. Cas. 550, 555.
(5) (1870) L. R. 6 Ch. 418.
(6) (1867) L. R. 2 H. L. 380.
(7) (1903) 21 Rep. Pat. Cas. 137; (1904) 21 Rep. Pat. Cas. 621, 628.
(8) (1880) 28 W. R. 973.
(9) (1884) 51 L. T. 141.
(10) (1887) 4 Rep. Pat. Cas. 207.
(11) 24 Rep. Pat. Cas. 65, 80.
(12) (1892) 9 Rep. Pat. Cas. 333.

PARKER J. 1912 PUGH v. RILEY CYCLE COMPANY.

If the plaintiff's design is good, we contend that what the defendants have done is not an infringement. [They also referred to *Cooper* v. *Symington*. (1)]

Astbury, K.C., in reply, referred to *Mitchell* v. *Henry*. (2)

Cur. adv. vult.

Feb. 16. PARKER J. In 1909 the plaintiff applied for, and in due course obtained, a grant of letters patent, No. 1587 of 1909, for improvements in wire spoked wheels. On May 11, 1909, before leaving the complete specification at the Patent Office, he registered as a design, under s. 49 of the Patents and Designs Act, 1907, a drawing shewing the disposition of the hub in relation to the rim, and the cross-sectional arrangement of the spokes in what may be referred to as a "triple spoke wheel." This drawing was subsequently embodied in his complete specification as illustrating one variation of his invention, and he also registered as designs under the same 49th section three other drawings to cover, as he says in the correspondence, other variations. Thereafter he entered into negotiations with the defendants with a view to the latter taking a licence under the letters patent and registered designs respectively.

In the course of those negotiations the defendants arrived at the conclusion that the letters patent were worthless, and the negotiations broke down. The defendants have now, for the purposes of sale, made triple spoke wheels of a shape or configuration which the plaintiff says is an obvious and fraudulent imitation of the first of his registered designs, being that numbered 541,916. With regard to this suggestion of fraud, the defendants undoubtedly had access to one of the plaintiff's wheels, to which this registered design had, or was alleged to have, been applied. If, therefore, they have in fact applied to the wheels made by them any imitation of the plaintiff's registered design, they may be said to have done so fraudulently in the sense of knowingly. This does not in my opinion necessarily involve fraud in the sense of dishonesty. Indeed the defendants appear to have taken considerable pains, in making triple spoke

(1) (1893) 10 Rep. Pat. Cas. 264. (2) (1880) 15 Ch. D. 181.

wheels, as they claimed the right to do notwithstanding the plaintiff's letters patent, to avoid adopting that particular shape or configuration which formed the subject of the plaintiff's registration. Whether they have succeeded or not is one of the points I have to determine, the second point being whether what the plaintiff registered was in fact a registrable design at all.

A design, to be registrable under the Act, must be some conception or suggestion as to shape, configuration, pattern, or ornament. It must be capable of being applied to an article in such a way that the article to which it has been applied will shew to the eye the particular shape, configuration, pattern, or ornament the conception or suggestion of which constitutes the design. In general any application for registration must be accompanied by a representation of the design—that is, something in the nature of a drawing or tracing by means of which the conception or suggestion constituting the design may be imparted to others. In fact, persons looking at the drawing ought to be able to form a mental picture of the shape, configuration, pattern, or ornament of the article to which the design has been applied. A conception or suggestion as to a mode or principle of construction, though in some sense a design, is not registrable under the Act. Inasmuch, however, as the mode or principle of construction of an article may affect its shape or configuration, the conception of such a mode or principle of construction may well lead to a conception as to the shape or configuration of the completed article, and a conception so arrived at may, if it be sufficiently definite, be registered under the Act.

The difficulty arises where the conception thus arrived at is not a definite conception as to shape or configuration, but a conception only as to some general characteristic of shape or configuration necessitated by the mode or principle of construction, the definite shape or configuration being, consistently with such mode or principle of construction, capable of variation within wide limits. To allow the registration of a conception of such general characteristic of shape or configuration might well be equivalent to allowing the registration of a

PARKER J. 1912 PUGH v. RILEY CYCLE COMPANY.

conception relating to the mode or principle of construction. Thus, in *Moody* v. *Tree* (1) the design registered was a picture of a basket, the claim being for the pattern of the basket, consisting in the osiers being worked in singly and all the butt ends being outwards. Obviously, there could be made by this method of construction any number of baskets differing in pattern, except that all would have a certain common characteristic due to the method of construction and visible to the eye. It was held that the registration was bad, as being an attempt to register a conception as to mode of construction, and not as to shape, configuration, pattern, or ornament. Similarly in *In re Bayer's Design* (2) the design registered was a picture of a corset, the novelty claimed being that it had the gores or gussets cut horizontally from front to back. It was held that this was not a design capable of registration, being a conception as to method of construction only, although all corsets made by this method would have in common a peculiarity due to that method and visible to the eye.

The design in question in the present case is registered in class 1, which consists of articles composed wholly or chiefly of metal. It is registered in respect of vehicle wheels. The novelty is said to consist of the disposition of the tyre rim (D) in relation to the hub, and in the cross-sectional arrangement of the spokes (A), (B), and (C), such disposition and arrangement being shewn in the representation accompanying the application for registration. This representation is a cross-sectional drawing of a vehicle wheel on the longitudinal central plane. It is a conventional drawing, such as would be used by an engineer to indicate how the wheel was to be constructed qua the disposition of rim in relation to hub, and qua the arrangement of the spokes. It does not shew or purport to shew what would be in fact seen if the wheel were cut on the longitudinal central plane. Indeed what would actually be seen on a sectional view in the longitudinal central plane would depend on other factors, for example, on the number of spokes in each set of spokes, or whether such spokes were radial or tangential, and so on. It would be easy for a competent mechanician to construct from

(1) 9 Rep. Pat. Cas. 333. (2) 24 Rep. Pat. Cas. 65.

the drawing a number of wheels whose configuration, from whatever standpoint they were looked at, would have little if anything in common, except the disposition of the rim in relation to the hub, and the cross-sectional arrangement of the spokes. But from each and every wheel so constructed a draughtsman with a competent knowledge of the conventions of mechanical drawing, if asked to draw a cross-section on the longitudinal central plane —shewing the disposition of the rim in relation to the hub, and the cross-sectional arrangement of the spokes—could (without actually cutting the wheel), and indeed inevitably would, arrive at the drawing in question. In this sense, therefore, it may be said that the design shewn in the drawing is visible to the eye after its application to vehicle wheels, though the eye to which it would be visible would have to be an eye trained, to some extent at any rate, in mechanical matters.

I will now look at the drawing and consider what is the particular disposition of the rim in relation to hub, and what is the particular cross-sectional arrangement of the spokes for which novelty is claimed. The disposition of rim in relation to hub can be best described by defining the position of one or more definite points on the hub with regard to one or more definite points on the rim. The most natural points to take on the hub for this purpose are the inner and outer flanges from which the spokes spring, more especially as the position of these points in reference to the rim must to a great extent condition the cross-sectional arrangement of the spokes. The drawing shews the inner flange of the hub as immediately below the centre of the rim and the outer flange of the hub as extending outside the outer edge of the rim to a distance about equal to the breadth of the rim. Further, with regard to the cross-sectional arrangement of the spokes, the drawing shews three sets of spokes—one set, namely those lettered (A), springing from the outer flange and being carried to the outer edge of the rim, and two sets, those lettered (B) and (C), springing from the inner flange and being carried respectively, the former to the outer edge, and the latter to the inner edge of the rim. Up to this point what I have really described is a method of construction and not any characteristic of shape or configuration which would be visible

PARKER J. 1912 PUGH v. RILEY CYCLE COMPANY.

to the eye in the completed article; but this method of construction, if faithfully followed, must necessarily give to the completed article those characteristics of shape and configuration which strike the eye on looking at the drawing. Such characteristics may be described as follows: The sets of spokes (B) and (C) will appear to constitute two sides of a triangle enclosing an angle upon the inner flange which would be bisected by the vertical plane drawn through the centre of the rim, and the two sets of spokes (A) and (B) will appear to constitute two sides of another triangle enclosing an angle on the outer edge of the rim. Further, the three sets of spokes will appear to lie on the surface of separate cones, spokes (A) being coned outwards and spokes (B) and (C) being coned at an equal angle with the vertical plane but in opposite directions, spokes (B) being coned inwards and spokes (C) outwards. It is obvious that the whole of this arrangement as to spokes would be altered the moment you began to change the position of the inner flange with regard to the rim. If, for example, you shifted this flange inwards, the two sets of spokes (B) and (C) would no longer appear to enclose an angle which would be bisected by the vertical plane. If this flange were shifted still further inwards, a point would soon be reached at which the set of spokes (C) ceased to be coned at all, or were even coned in an opposite direction. This last result would be hastened if the sets of spokes (B) and (C) were attached to the rim, not at its extreme edges, but at points nearer to but still equidistant from the centre of the rim. If it were desired to shift the flange nearer to or further from the inside edge of the rim, it might be possible within narrow limits to preserve to some extent the other characteristics to which I have referred, but to do so it would be necessary to shift also the points at which the spokes strike the rim. The plaintiff's registered design 541,917 is a good instance of how this could be done.

I have found it impossible to state precisely the characteristics of shape or configuration involved in the particular disposition and arrangement for which novelty is claimed without entering into the foregoing details. If, however, an engineer or mechanician were asked to make a precise statement of the nature of the disposition and arrangement in question, it is quite possible that

he would see in the drawing more than would meet the eye of an ordinary person. He would see it was a conventional cross-sectional drawing, and would naturally read it as a direction for the construction of a vehicle wheel. He would see the mechanical advantages to be gained by this method of construction, and might determine in his own mind what points in the drawing were mechanically essential and what were not essential to this method. He might then possibly formulate a statement which would embrace what he considered essential, and omit what he considered unessential. For example, the plaintiff's witnesses would have me read the registered design as covering all varieties of shape or configuration, provided (1.) the inner flange of the hub was overlapped, however little, by the inner edge of the rim, and (2.) there were three sets of spokes (A), (B), and (C), spokes (A) passing from the outer flange to the outer edge of the rim, spokes (B) from the inner flange to the same edge, and spokes (C) from the inner flange to the inner edge of the rim. This method of construction would, no doubt, involve in the completed article the appearance of two triangles, one with its apex on the inner flange, and the other with its apex at the outer edge of the rim and having a common side in the spokes (B), but would admit of the appearance of the completed article, qua the position of hub in regard to rim, and qua the cross-sectional arrangement of the spokes, being varied within wide limits.

Further, if you once begin to move the inner flange from the position shewn in the drawing, there is no reason why you should stop at the point they suggest. The appearance in cross-section would be practically the same, whether the inner edge of the rim slightly overlapped the flange or vice versa, and again the general appearance in cross-section would be little altered if spokes (B) did not run to the same point on the rim as spokes (A), but ran to some point further inwards.

The truth seems to be that it is the precise disposition of the inner flange of the hub in relation to the rim which determines the precise cross-sectional arrangement of the spokes and makes the conception of shape and configuration involved in the mode of construction at all definite. Once allow this

PARKER J. 1912 PUGH v. RILEY CYCLE COMPANY.

disposition to be altered, and you have no definite conception of shape or configuration left, but only a general characteristic of shape due to the method of construction. In my opinion, the registration, so construed, would bring the case within the authorities I have cited, and would be void as an attempt to protect a mode of construction, as opposed to a conception as to shape or configuration. The validity of the registration can, in my opinion therefore, only be saved by construing the application as seeking protection for that definite shape or configuration in the completed article which will result from its construction precisely in accordance with the registered drawing, or for a shape or configuration which is to the eye substantially the same; and, in considering whether the shape or configuration of one wheel is the same or substantially the same in the respects mentioned as that of another wheel, engineering evidence is, for the most part, out of place. The eye, and the eye only, must be the judge.

This being so, I propose to compare the plaintiff's drawing with an exhibit which is for all practical purposes a correct drawing on the longitudinal central plane shewing the disposition of the rim in relation to the hub and the cross-sectional arrangement of the spokes in the alleged infringing article. It seems to me that this comparison is fairer than a comparison between the two completed articles, for the shape and configuration of the completed article (what one sees when one looks at it) depends not only on the points for which novelty is claimed and which are alone shewn in the plaintiff's drawing, but on other factors, which may vary in different wheels. And, further, I have no specimen of an article made in exact conformity with the registered drawing. I have the wheel to which the defendants had access, made by the plaintiff under his letters patent 1587 of 1909, and I have also half of another wheel made under the same patent, but both these wheels depart from the registered design. The inner flange, for example, is by no means vertically below the centre of the tyre, but has been shifted inwards, with the consequences to which I have already alluded, and this makes the wheel much nearer in appearance to the defendants' wheel. Comparing these two drawings, I do not think that any one would

say that the defendants' drawing was the same as the plaintiff's drawing. In the first place, the disposition of the defendants' hub in relation to the rim is noticeably different. The outer flange of the hub projects, it is true, beyond the outer edge of the rim to about the same distance as in the plaintiff's drawing, but the inner edge of the rim only just overlaps the inner flange of the hub, and therefore the inner flange is no longer vertically below the centre of the rim, but for all practical purposes immediately below the inner edge of the rim. This is a very material alteration, because it affects to a noticeable degree the cross-sectional arrangement of the spokes. These spokes are, it is true, arranged in three sets of the respective surfaces of three cones, but—partly owing to the fact that the inner flange is not situated vertically under the centre of the rim, and partly, I think, because the spokes from this flange are fixed to points in the rim nearer to, though still equidistant from, its centre—the two sets of spokes (B) and (C) are both coned inwards. For the like reason the sets of spokes (B) and (C) do not enclose on the inner flange an angle, which would be bisected by a vertical plane drawn through the centre of the rim. Are these differences so trifling that the disposition of hub in relation to rim and the cross-sectional arrangement of the spokes are substantially the same as in the plaintiff's drawing? Judging by the eye alone, they appear to me to be substantially different. Indeed, they attract attention as soon as, or even sooner than, any points of similarity between the two drawings. I do not think that any one looking at the drawings would say that the cross-sectional appearance of the spokes was substantially the same in each unless he had in his mind a mode of construction rather than a conception of shape or configuration; nor do I think any one would say that the defendants' drawing was an imitation, much less an obvious imitation, of the plaintiff's drawing, unless he were judging both by the method of construction involved rather than by the appearance they present to the eye.

I have come to the conclusion, therefore, that the plaintiff is in this dilemma: Either his registration is bad as an attempt to protect a mode of construction, or there has been no infringement. I need not, under the circumstances, choose between the

PARKER J. 1912 PUGH v. RILEY CYCLE COMPANY.

two alternatives. I may observe, however, that the plaintiff himself at one time must have taken the view that the central position of the inner flange in relation to the rim was an essential part of the design, otherwise he would not have registered design No. 541,917, which far more nearly than the defendants' drawing resembles the design in respect of which he sues.

The action must be dismissed with costs.

Solicitors for plaintiff: *Andrew, Wood, Purves & Sutton, for R. A. Rotherham, Coventry.*

Solicitors for defendants: *Maddocks & Colson, for Maddocks, Ogden & Co., Coventry.*

F. E.

PARKER J. 1912 *Feb.* 25.

In re HOBSON.
BARWICK *v.* HOLT.

[1911 H. 1283.]

Will — Construction — Gift of Income to Fourteen named Persons during respective Lives—Substitutional Gift to Children—Gift over of Whole on Death of Survivor of Thirteen only — Death in Testator's Lifetime — Implication of Survivorship—Partial Intestacy.

Testator gave the income of his estate, real and personal, to trustees upon trust to pay and divide the same equally between and amongst S., the daughter of C., and thirteen other named persons during their respective lives, and, if any of them should die leaving children them surviving, directed the share of income payable to the parent to be divided equally amongst his, her, or their children, and from and after the death of the survivor of the said thirteen other named persons (the name of S. being omitted) upon trust to sell the whole of his trust estates and divide the proceeds equally amongst such of the children of the said C. and thirteen other named persons (the name of S. being again omitted) as might be living at the death of the last survivor of them, or, if any of them were dead leaving children them surviving, then amongst their children, such children to take their parent's share equally between them. Two of the thirteen named persons died in the testator's lifetime without leaving children:—

Held, that there was an intestacy as to these two shares of income down to the period of distribution.

ADJOURNED SUMMONS.

By his will, dated May 16, 1889, the testator, Joseph Hobson,

directed his trustees to receive the rents and profits arising from his real estate and the surplus income of his personal estate (after payment of certain annual sums) and "to pay one half of the same quarterly commencing six months after my death unto my sister, Elizabeth Lea, and the other half to my sister, Bathsheba Holt, during their respective lives, and after the death of either or both of them, my said sisters, then upon trust to pay and divide the share of the said rents and profits to which either or both of them were entitled, and on the same quarterly days as the same are directed to be paid to my said sisters, equally between and amongst Sybil Holt, the daughter of the late Charles Holt, Joseph, Emily, Annie, Lucy, Elizabeth and Joshua Holt, the children of my sister Bathsheba Holt, Alice Thornton and Ann Thornton, the children of my late sister Hannah Thornton, Herbert, Joseph and Elizabeth Hobson, the children of my nephew Benjamin Hobson, and Jane and Annie Robinson, the children of my late wife's cousin, during their respective lives, and in case any of them shall die leaving children them surviving, I direct that the share of the income payable to the parent so dying shall be divided equally amongst his, her or their children, and from and immediately after the death of the survivor of them the said Joseph, Emily, Annie, Lucy, Elizabeth and Joshua Holt, Alice and Ann Thornton, Herbert, Joseph and Elizabeth Hobson, and Jane and Annie Robinson, then upon trust to sell and realise the whole of my said trust estates and divide the proceeds equally amongst such of the children of the said Charles, Joseph, Emily, Annie, Lucy, Elizabeth, and Joshua Holt, Alice and Ann Thornton, Herbert, Joseph and Elizabeth Hobson, and Jane and Annie Robinson, as may be living at the date of the death of the last survivor of them, or in case any of them be dead leaving children them surviving, then amongst their children, such children taking their respective parent's share equally between them if more than one."

The testator died on June 27, 1892. Joshua Holt and Joseph Hobson died without leaving children in the testator's lifetime. Elizabeth Lea died in 1910. Bathsheba Holt had also died since this summons had been taken out.

This was an originating summons taken out by the trustees for

PARKER J. 1912 — HOBSON, *In re.* BARWICK *v.* HOLT.

the determination of (inter alia) the question whether on the true construction of the will the shares of income given to Joshua Holt and Joseph Hobson were undisposed of by the will during any and what period, or whether they accrued in equal shares to such of the other persons (or their children) to whom shares of the said income were given on the death of either or both of Elizabeth Lea and Bathsheba Holt.

Dighton Pollock, for the trustees.

Cann, for persons claiming under an intestacy. The several legatees take as tenants in common, and in the events which have happened there is an intestacy as to these two shares until the period of distribution. There is no room for any implication of survivorship in the present case. Cases like *Pearce* v. *Edmeades* (1) and *Alt* v. *Gregory* (2) are distinguishable, as nothing was there given to the children of the original legatees until the death of the survivor of them. There is no case in which the survivors of the original legatees have been held entitled to the entire income where, as here, there is a gift of the original legatee's share to his children in case of his death leaving children. [He also cited *Jones* v. *Randall* (3), *Bryan* v. *Twigg* (4), and *Rownd* v. *Pickett*. (5)] Moreover in the present case there are fourteen persons to whom the rents and income are given, and it is on the death of the survivor of thirteen of them only that the capital is given over, the name of Sybil being omitted.

C. E. Shebbeare, for other persons in the same interest.

Maugham, for persons claiming by survivorship. Under a gift of income to several persons in language importing a tenancy in common with a gift over of the whole fund on the death of the survivor it is a general rule that on the death of any one before the period of distribution the survivors take the entire income, whether it is based on the footing of construing the original gift as creating a joint tenancy or on the implication of a clause of survivorship: *Armstrong* v. *Eldridge* (6); *Pearce* v. *Edmeades* (1); *Alt* v. *Gregory* (2); *In re Telfair*. (7) The real ground of the

(1) (1838) 3 Y. & C. Ex. 246.
(2) (1856) 8 D. M. & G. 221.
(3) (1819) 1 Jac. & W. 100.
(4) (1867) L. R. 3 Ch. 183.
(5) (1878) 47 L. J. (Ch.) 631.
(6) (1791) 3 Bro. C. C. 215.
(7) (1902) 86 L. T. 496.

rule is to avoid an intestacy, and the mere fact that in the event of a legatee dying leaving children his children are substituted in his place is no reason for departing from the rule in the event of a legatee dying without leaving children, though there appears to be no actual decision in point. The omission of the name of Sybil in the enumeration of the original legatees on the death of the survivor of whom the property is given over—which was probably due to a slip—is too trifling a distinction to take the case out of the general rule. The plain intention of the testator was to deal with the whole income down to the period of distribution, and it will defeat his intention if the Court holds that there is an intestacy as to these two shares.

[PARKER J. referred to Theobald on Wills, 7th ed. p. 516.]

Ward Coldridge, for other persons in the same interest, referred to Jarman on Wills, 6th ed. pp. 1795, 1797, 1798, n. (*u*).

Romer, K.C., and *C. B. Marriott*, for other parties.

PARKER J. The testator's will in this case is by no means easy to construe and in construing it I do not find much assistance from any of the cases which have been referred to. The material clauses on the point which I have to decide are these: the testator directs that his residuary estate shall be invested and that the trustees are to receive all the rents and profits arising from his real estate and all surplus that there may be from investments of his personal estate after payment of certain annual sums therein directed to be paid, and "to pay one half of the same, quarterly commencing six months after my death, unto my sister, Elizabeth Lea, and the other half to my sister, Bathsheba Holt, during their respective lives." So far there is no doubt about the meaning. Then he goes on, "And after the death of either or both of them my said sisters"—these are the two tenants for life—"then upon trust to pay and divide the share of the same rents and profits to which either or both of them were entitled and on the same quarterly days as the same are directed to be paid to my said sisters equally between and amongst" certain named persons. I may pause there to say that it has been suggested that the fact that the testator in that clause used the expression "the same rents and profits" shews

PARKER J. 1912 HOBSON, *In re.* BARWICK *v.* HOLT.

that he was dealing only with the real estate as opposed to the personal estate. In my opinion, however, having regard to all the prior words and the fact that he has used the word "profits" in connection with the personal estate as well as the real estate, the right inference is that he is dealing with the whole income whether arising from real or personal estate. The point, I may add, only arises incidentally and is not actually raised by the summons, but I am prepared to take that view of it and to make a declaration to that effect.

The income of the whole estate, therefore, is to be divided between fourteen named persons and, as the will goes on to direct, "during their respective lives," so that just as under the previous gift the two sisters were entitled to the income of the property as tenants in common during their respective lives, under the gift to take effect on their deaths I find fourteen people entitled prima facie as tenants in common to the same income during their respective lives. The will proceeds, "And in case any of them shall die leaving children them surviving, I direct that the share of the income payable to the parent so dying shall be divided equally amongst his, her or their children." Now that clause would, no doubt, according to the ordinary principle be read as a substitutional or original gift, according as any of the named persons died in the lifetime of the testator or after his death. If any of them died in his lifetime, then it is a substitutional gift in favour of the children who survive the testator. If, on the other hand, any of the fourteen persons are alive at the testator's death, then it is an original gift in remainder after his or her life interest to his or her children. So far I think the will is reasonably clear. Then it goes on, "And from and immediately after the death of the survivor of them"—and then he names thirteen out of the fourteen—"upon trust to sell and realise the whole of my said trust estates and divide the proceeds equally amongst such of the children" of the thirteen people and one other, that one other being the father of the fourteenth person originally named, as may fulfil certain conditions. That is plainly a distribution per capita and not per stirpes. So far again I think the language is reasonably clear, but the difficulty arises with regard to certain implications which I am asked to

draw which are said to be justified by the fact that otherwise, in the events which have happened, there is a partial intestacy, and also by certain authorities which bear some analogy to the case actually before me, although they are certainly not in any sense upon all fours with it.

It appears that two of the named persons died in the testator's lifetime without leaving children, and I am asked to imply a gift of their shares of income down to the time of the ultimate division of the capital of the estate in order to avoid an intestacy. In my opinion it is quite clear on the authorities that where there is a gift equally between A., B., and C. during their respective lives and after the death of the survivor of them the whole property is given over, the Court has implied an intention on the part of the testator that the survivors or survivor of A., B., and C. shall after the death of one or more of them be entitled to the whole income down to the period of distribution, and that conclusion appears to have been arrived at in one of two ways. In the first place and in the earlier cases the judges have said that a gift in equal shares during their respective lives only prima facie creates a tenancy in common, and that, if the Court can gather an intention on the face of the will that the tenancy was intended to be not a tenancy in common but a joint tenancy, it will treat the words "in equal shares" or other similar words as not destructive of what would otherwise be a joint tenancy; and that interpretation is one which would in the ordinary course lead to the desired effect. On the death of A., for instance, B. and C. would continue to be joint tenants of the whole, and on the death of B., C. again would become tenant of the whole. That is one way of meeting the difficulty and of avoiding an intestacy; but in other cases the rule has been rested on different grounds in this way. It has been said that where there is a gift to A., B., and C. equally during their respective lives, and after the death of the survivor over, an intention is manifested that A., B., and C., or such of them as shall be living for the time being, shall enjoy the property down to the period of distribution, and that the best way of effecting that intention is to imply a gift over on the death of any of them of his or her share as well original as accruing to the

PARKER J. 1912 HOBSON, *In re.* BARWICK *v.* HOLT.

survivors or survivor; and some of the cases have, I think, been decided on what I may describe as a mixture of those two theories.

In the present case, however, I am asked to do something which appears to me to be different from anything which has been done in any other decided case, and I am asked to do that in construing a will which is certainly different from any will upon which the decisions to which I have referred have been founded. In the first place it appears to me that I cannot give effect to any intention which I can fairly presume on the part of the testator by construing this gift as creating a joint tenancy. The effect of so doing would be this. If I were to hold that the fourteen named persons were entitled as joint tenants and not as tenants in common, then, on the death of one of them leaving issue, by the very words of the will the joint tenancy would be severed so far as his or her share was concerned, and the joint tenancy which originally existed between all of them would continue to exist only between the other original takers, and so on as any one or more died leaving issue. The result would be that on the deaths of those who died without issue the persons to take would be the persons still alive and the stocks of those who had died would be excluded. In the next place, let me look at it from the other point of view and see if I can arrive at a satisfactory result by the implication of a gift to the survivors. In this case it appears to me that, in order to carry out any intention which I can fairly presume on the part of the testator, I should have to imply not an ordinary gift over on the death of any one of the first takers to the others, but I should have to say further that, contingently on any one of them dying without issue, his or her share was to go, not to the survivors in the ordinary sense of the word, but to the survivors in a modified sense of the word, construing it as including survivorship by stocks. In that case, on the death of one of the first takers without leaving issue after the death of another leaving issue, the issue of the one who had previously died leaving issue would be entitled to a share as representing his parent, his parent being considered to have survived by reason of the survivorship of the stock. I am by no means clear, however, that the

word " survivor " could be properly construed in that way, though no doubt an express limitation might be so framed as to produce that effect. But in any case the gift which I am asked to imply appears to me to be different from any other gift by implication which I can find in the books. Moreover, so far as I am aware, the cases in which gifts of this nature have been implied have been confined to cases in which the gift over is on the death of the survivor of all the first takers, while in the present case the gift over is not on the death of the survivor of all the first takers, but on the death of the survivor of thirteen out of the fourteen first takers. In the next place, I can find no case in which the implication has arisen where provision is made for the persons entitled under the ultimate gift over, or some of them, during the lives of some of the first takers where others have died. For instance the ordinary gift in this class of cases is a gift to A., B., and C. during their respective lives and after the death of the survivor of them to their children per capita. That is the usual form. In no case that I can find has there been a provision giving the children who ultimately take under the gift over an interest in substitution for their parent before the period of distribution. In my opinion, therefore, not only is the case which I have before me different in many material respects from other cases in which implications such as I have mentioned have arisen, but the implication which I am asked to draw is one which in itself is quite different from any which has been considered to be legitimate in the cases to which I have referred. Under these circumstances I have to consider whether I ought on any general principle to introduce a limitation or series of limitations into a will which does not contain them and from which they cannot be gathered by any ordinary method of construction for the mere reason that, if I do not do so, there will be a partial intestacy in the events which have happened.

It appears to me that in this case the testator clearly contemplated that these people might die leaving children or without leaving children. He has made a disposition to meet the case of their dying leaving children and has left the rest of the will to be dealt with according to the ordinary method of construction,

PARKER J. 1912 HOBSON, *In re.* BARWICK v. HOLT.

and it does not appear to me that I have any right to read so complicated a clause into a testator's will merely to avoid an intestacy. I quite agree that if the testator had been asked what his wishes were in the possible event which has now actually happened, he would probably have said that the income had better go to the survivors or the children of those who were then dead; but he has not in fact said so, and it is not right to consider the question from the point of view of whether the testator did or did not contemplate an intestacy. The question is whether, on a reasonable construction of the will, he has in the event which has happened avoided an intestacy by giving a property, which otherwise would be undisposed of, to some other legatee. In my opinion he has not done so, and, although it would be a rational thing, and one of which the testator would, if he had been alive, have probably approved, in my opinion it would be a bad precedent, and one which I am not justified in making, to draw any such implication as I am asked to draw in the present case. There must be a declaration accordingly that these two shares of income are undisposed of by the will down to the time of distribution.

Solicitors: *Thorowgood, Tabor & Hardcastle, for Bond, Barwick & Peake, Leeds; Jaques & Co., for Scott & Turnbull, Leeds; Crowders, Vizard, Oldham & Co., for Thurnall, Burgess & Watson, Kettering.*

A. C.

In re TAYLOR'S PATENT.

PARKER J.

1912

Feb. 29.

Patent—Revocation—Manufacture outside the United Kingdom—"Sufficient Reasons"—Threat of Infringement Action—Voluntary or Compulsory Licence—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *ss.* 24, 27.

The appellants, an American corporation, in 1908 became the assignees of a patent in the United Kingdom, issued in 1904, which they made various unsuccessful efforts to exploit in the United Kingdom. The E. Company were the owners of a patent known as Daley's patent issued in 1899, and, according to a decision of an American Court in 1908 upon two corresponding American patents, the appellants' patent could not be worked without an infringement of Daley's patent. After the decision of the American Court the E. Company wrote a letter to the appellants which in the opinion of the Court amounted to a threat of an action for infringement in case the appellants should work their patent in the United Kingdom, in consequence of which the appellants suspended further efforts to exploit the patent. In 1910 the managing director of the E. Company applied under s. 27 of the Patents and Designs Act, 1907, for the revocation of the appellants' patent on the ground that the patented article was manufactured exclusively or mainly outside the United Kingdom. The Comptroller-General revoked the patent, considering that the threat of an action for infringement did not constitute a "satisfactory reason" for the non-manufacture of the patented article in the United Kingdom within s. 27, sub-s. 2, it being the duty of the appellants to have made every effort to come to an agreement with the E. Company, or, in default of agreement, to have applied under s. 24 for a compulsory licence:—

Held, on appeal, without laying down any general rule, that under the circumstances of this case, having regard to the threat of an infringement action, the appellants had shewn "satisfactory reasons" within s. 27, sub-s. 2, and that no order for revocation ought to be made.

PETITION.

This was an appeal by way of petition by the Lenher Engineering Company of New York, U.S.A., an American corporation, the registered owners of the above-mentioned patent (No. 28,475 of 1904), for "Improvements in and relating to mechanical underfeed stokers," against an order of the Comptroller-General of Patents, Designs, and Trade Marks, made under s. 27 of the Patents and Designs Act, 1907, for the revocation of the patent, on the application of the managing

PARKER J. 1912 TAYLOR'S PATENT, *In re.*

director of the Erith's Engineering Company, Limited. The case before the Comptroller is reported in 29 Rep. Pat. Cas. 30.

The original patentee died in 1906, and on December 22, 1908, his executor, who had then only proved his will in the United States, executed an assignment of the letters patent to the appellants. Subsequently, after obtaining probate of the will in England, the executor executed another assignment, dated January 11, 1911, to the appellants, which was recorded at the Patent Office on February 18, 1911.

The appellants in the year 1908, some six months before the first assignment of the letters patent, caused the following advertisement to be inserted in various periodicals:—"The proprietor of the Patent No. 28,475 of 1904 for Improvements in and relating to Mechanical Under-feed Stokers is desirous of entering into arrangements by way of license or otherwise on reasonable terms for the purpose of exploiting the same and insuring the full development and practical working in this country. All communications should be addressed in the first instance to Haseltine, Lake & Co., 7 and 8, Southampton Buildings, Chancery Lane, W.C."

The appellants also communicated directly with some twelve manufacturing firms in this country, including the Erith's Engineering Company, and on July 25, 1908, sent their agent to England for the purpose of endeavouring to arrange for the manufacture of the patented article or sale of the patent, who procured a stoker to be made by Dick, Kerr & Co., Limited, to serve as a pattern. While this stoker was under construction, the appellants received replies from seven of the firms in this country with whom they had communicated, none of whom were desirous of dealing in the patented articles, the Erith's Engineering Company in their reply stating that they did not consider that it had any commercial value.

The Erith's Engineering Company were the owners of a patent in this country known as Daley's patent (No. 22,806 of 1899) which would expire in 1913. It appeared that there were two patents in the United States respectively corresponding to the appellants' patent and Daley's patent, and on October 3, 1908, the Circuit Court D, Rhode Island, decided that the patent

corresponding to the appellants' patent could not be worked without an infringement of the patent corresponding to Daley's patent. (1) The respective parties had since come to terms under which the patent corresponding to the appellants' patent was worked in the United States, but no similar arrangement had been come to in the United Kingdom, and on November 10, 1908, the Erith's Engineering Company, the owners of Daley's patent, wrote the following letter to Haseltine, Lake & Co., the appellants' agents:—

"London
"10 Nov. 1908.

"Dear Sirs

"*Taylor Stoker Patent* 28,475/04.

"On 12th August you offered us British patent and we replied 14th idem we did not consider it had commercial value.

"We are now advised the U.S. Circuit Court has declared Taylor's corresponding U.S. patent 792,962/05 to be an infringement of Daley's patent U.S. 644,664/1900 (to which Mr. Erith's patent Daley U.K. 22,806/99 corresponds), and judgment has been given for our friends the Underfeed Stoker Co. of America, Chicago.

"Any user of Taylor's patent here would therefore be liable for infringement of our Daley U.K. patent as above.

"Yours faithfully
"Eriths Engineering Co. Ld.
"Charles Erith
"Director

"Messrs. Haseltine Lake & Co.
"7 Southampton Buildings W.C."

As the result of this letter the appellants suspended further efforts to exploit their patent in the United Kingdom.

Mr. Charles Erith, the managing director of Erith's Engineering Company, made his application, filed on November 9, 1910, for the revocation of the appellants' patent on the ground that the patented article was manufactured exclusively or mainly outside the United Kingdom. (2)

(1) *Underfeed Stoker Co. of America* v. *American Ship Windlass Co.* (1908) 165 Fed. Rep. 65.

(2) Patents and Designs Act, 1907, s. 27, provides:
"(1.) At any time not less than

PARKER J.
1912
TAYLOR'S PATENT, *In re.*

The application was heard on November 21, 1911, and on December 11, 1911, the Comptroller-General delivered a considered judgment. He was of opinion that the reasons given for the non-manufacture of the patented article in this country were insufficient. As regards the threat of infringement proceedings, he did not consider this a satisfactory reason within the meaning of s. 27. It was the duty of the patentees to have made every effort to come to an agreement with the Erith's Engineering Company, or in default of agreement to have applied under s. 24 for a compulsory licence. He accordingly made an order for the revocation of the patent. The Lenher Engineering Company appealed.

A. J. Walter, K.C., and *H. Fletcher Moulton*, for the appellants. The first duty of a person who applies for revocation of a patent under s. 27 is to shew that he is acting bona fide. The application in the present case which was made on behalf of the Erith's Engineering Company by their managing director was not bona fide, but is an attempt to get rid of the appellants' patent so as to give the Erith's Engineering Company on the expiration of their own patent in 1913 a clear field in this country without the obligation of obtaining a licence from the appellants during the continuance of the appellants' patent. The letter of November 10, 1908, contains a clear threat of infringement

four years after the date of a patent, and not less than one year after the passing of this Act, any person may apply to the comptroller for the revocation of the patent on the ground that the patented article or process is manufactured or carried on exclusively or mainly outside the United Kingdom.

"(2.) The comptroller shall consider the application, and, if after enquiry he is satisfied that the allegations contained therein are correct, then, subject to the provisions of this section, and unless the patentee proves that the patented article or process is manufactured or carried on to an adequate extent in the United Kingdom, or gives satisfactory reasons why the article or process is not so manufactured or carried on, the comptrollor may make an order revoking the patent either—

"(*a*) forthwith; or

"(*b*) after such reasonable interval as may be specified in the order, unless in the meantime it is shown to his satisfaction that the patented article or process is manufactured or carried on within the United Kingdom to an adequate extent: . . . ."

proceedings by Erith's Engineering Company, and it is an impossible position to take up that on the one hand they can prevent the appellants from working their patent except at the risk of infringement proceedings, and on the other hand apply to revoke the patent under s. 27 on grounds which are the result of their own conduct. The Comptroller was wrong in holding that the appellants ought to have applied for a voluntary or compulsory licence under s. 24. That section is at present unexplained by decisions, and a long and costly litigation would have been the probable result of any such attempt. The appellants had already offered the Erith's Engineering Company a licence to use the appellants' patent on reasonable terms. The appellants have shewn "sufficient reasons" why the patented article is not manufactured in the United Kingdom within s. 27, sub-s. 2—*In re Hatschek's Patents* (1)—and this appeal should be allowed.

R. Moritz, for the respondent. The motives of a person applying for revocation of a patent under s. 27 are wholly irrelevant. No applicant under that section is likely to be guided by purely philanthropic motives, and the sole question is whether the appellants have satisfied the Court that there are "satisfactory reasons" for the non-manufacture of the patented article within s. 27, sub-s. 2. The letter of November 10, 1908, does not bear the interpretation put upon it by the appellants. It was not so much a threat of infringement proceedings as a statement of the facts and an invitation to further negotiations. In any case it was the duty of the appellants to have applied for a voluntary licence and then, if that had been refused, for a compulsory licence under s. 24, and the Comptroller was right in so holding. In *In re Hatschek's Patents* (2) your Lordship says: "It can never, in my opinion, be sufficient for a patentee defending himself under the section to prove that he cannot now start an industry with any chance of profit. The question really is, Could he have done so if he had used his monopoly fairly as between home and foreign trade, or if he had devoted the time and money which he has expended in developing a foreign

(1) [1909] 2 Ch. 68; 26 Rep. Pat. Cas. 228.
(2) [1909] 2 Ch. 89.

PARKER J. 1912

TAYLOR'S PATENT, *In re.*

industry to developing a home industry?" Those remarks apply to the present case and this appeal should be dismissed.

Sir J. Simon, S.-G., and *Sargant*, for the Attorney-General. We take no side as between the two parties to this appeal, nor do we question the soundness of your Lordship's statement of the law in *In re Hatschek's Patents* (1) that "any one, whether having any real interest in the development of British industries or not . . . . and whatever be his motive, can, by satisfying the Comptroller of the existence of the state of circumstances contemplated in sub-s. 1, impose on a patentee the onus of justifying the use he has made of his monopoly"; but in the view of the Board of Trade s. 27 was passed in the interests of the general public, and on any application under the section it is material to consider whether the section itself is being misused against the interest of the public for some private object, and from that point of view the conduct of the Erith's Engineering Company and the fact that they made no offer to grant a licence under their patent to the appellants appear to be of some importance.

A. J. Walter, K.C., in reply.

PARKER J. This is an appeal from the order of the Comptroller-General revoking the patent No. 28,475 of 1904. The present owners of the patent are the Lenher Engineering Company, and they appear to have acquired the patent in the year 1908 from the executor of the will of the original patentee. So soon as they acquired the patent,—in fact even before the actual assignment,—they took steps with a view of exploiting the invention in the United Kingdom. For that purpose they, or their agents in this country, advertised in certain well-known engineering papers and also sent letters to various engineering firms with a view to lead them to acquire, or take licences under, the patent, and so introduce the manufacture of the patented article into this country.

It appears, however, that there was in this country a prior patent, which I will call Daley's patent, and that was in the hands of the Erith's Engineering Company. Corresponding to the patent which the Comptroller has revoked was an American

(1) [1909] 2 Ch. 82.

patent, and there was also an American patent corresponding to Daley's patent. Towards the close of the year 1908, after litigation in the United States, it was determined in the Courts of the United States that the patent corresponding to Daley's patent was, in that country at any rate, a master patent, so that the patent corresponding to the revoked patent could not be worked in the United States without involving an infringement of the master patent. Thereupon on November 10, 1908, the Erith's Engineering Company, the owners of Daley's patent in this country, wrote a letter amounting in effect, as I think, to a threat that they would take proceedings for infringement of Daley's patent in respect of any manufacture or user of articles made under the revoked patent. It has been assumed in the argument before me, and I understand that both parties admit the correctness of the assumption, that the revoked patent could not be worked in this country without infringing Daley's patent, of which the Erith's Engineering Company are the owners, and after the date of that letter the efforts of the appellants, the owners of the revoked patent, to exploit their patent in this country were, at any rate, more or less discontinued—in fact under the circumstances the only persons who could work the appellants' patent in this country were the Erith's Engineering Company. The appellants had already offered them a licence to work under it and they had already refused to take a licence, alleging as the ground that the patent was of little, if any, commercial value.

The applicant for revocation is the managing director of the Erith's Engineering Company, and it appears that Daley's patent, the master patent, will come to a natural end in the course of the year 1913. It is obviously, therefore, to the interest of the Erith's Engineering Company to revoke the appellants' patent, and they have succeeded in revoking it before the Comptroller. It is equally their interest not to grant to the appellants a licence under their own master patent which would enable the appellants' patent to be worked in this country, for if that patent were worked in this country they could no longer take advantage of s. 27 of the Patents and Designs Act, 1907, so as to remove the patent in question out of their way to the future benefit of their trade after the expiration of their own patent.

PARKER J. 1912 TAYLOR'S PATENT, *In re.*

Now when I come to consider the evidence on the petition it appears to me to be quite clear that the applicant for revocation has made out the prima facie case required by s. 27. The patent in question is not and never has been worked in the United Kingdom, and at the same time there is a certain amount, probably a considerable amount, of manufacture under the patent in the United States. It falls, therefore, upon the owners of the patent to shew cause why the patent should not be revoked; and they shew cause in the way which I have already suggested by saying that the Erith's Engineering Company are the only persons who, having regard to the master patent, can work the revoked patent in this country; that the Erith's Engineering Company have already refused to take a licence under it, and that it is therefore useless for the appellants to make any further efforts with a view to the exploitation of the patent in this country because they are liable to be stopped by injunction for infringement of the Erith's Engineering Company's patent. In answer to that, the Erith's Engineering Company, who by their manager are in the position of applicants for revocation in this case, reply, "You ought to have applied for a compulsory licence"; they do not say that they were ready and willing to grant a licence on reasonable terms, and I am by no means sure that, if the appellants had first applied for a voluntary licence, it would have been possible for them to obtain it, nor am I sure that, if they had applied for a compulsory licence, it would not have led to a costly procedure before the Comptroller, the result of which, having regard to the words of s. 24 under which such licences are granted, might be open to considerable doubt. I quite agree that the motive of the applicant for revocation of a patent under s. 27 is immaterial, but the position and conduct of the applicant, so far as they may have influenced the action of the patentee or owner of the patent, do appear to me to be material, and under the circumstances which I have stated it seems to me that there was reasonable ground for the inaction of the appellants in not taking further steps to press the manufacture and sale in this country of the patented article. In construing this section I have to remember that it is really intended for the benefit and protection of the public and is not, primarily at any rate, intended to confer

a benefit on individuals. It is no doubt true that every person who applies to revoke a patent under the section has probably a personal interest in obtaining the revocation, but in considering whether it is or is not a proper case for revocation the Comptroller or the Court is, in my opinion, bound to look primarily not to the interests of the individual but to the interests of the public. In the present case, except that they made no application for a compulsory licence, it is, in my opinion, impossible to say that the appellants could have done more than they actually did in the matter; and the real point is, whether the fact that they could not, having regard to the master patent, have worked the revoked patent in this country is a sufficient answer to the case made for revocation, notwithstanding that they did not apply for a compulsory licence or even, so far as the evidence goes, for a voluntary licence. I do not think it necessary to lay down any general rule applicable to other cases, but in the particular case with which I have to deal I am of opinion that the non-application for either a voluntary or a compulsory licence is not a sufficient reason for determining that the appellants ought to have their patent revoked when as a matter of fact nothing that they could have done in this country could have been done without the risk of infringement proceedings by the applicants for revocation. The Comptroller has in his considered judgment gone into various other points as to the steps which he considered the appellants ought to have taken under the circumstances, but when the first point as to the necessity of applying for a compulsory licence is decided in the way in which I have decided it, it seems to me to follow that, if the appellants were under no obligation to apply for such a licence, they were certainly under no obligation to do anything further in the matter. I have had some hesitation in this case whether the proper order would not be an order for revocation at a future date, so that the appellants may either apply for a compulsory licence or wait till the date of the expiration of Daley's patent and then work their own patent in this country, but on the whole I think the more convenient course will be to make the usual order refusing to revoke the patent, and not a conditional order which may entail future proceedings involving useless costs. As a matter of fact the dismissal of this

PARKER J. 1912 TAYLOR'S PATENT, *In re.*

application will not prejudice any future application for revocation, if, when circumstances have altered, there is or continues to be a neglect to work the invention within the jurisdiction. I think, therefore, that under the special circumstances of this case the decision of the Comptroller ought to be reversed and the original application dismissed.

Solicitors: *Woodham Smith & Borradaile; W. J. H. Diplock; Solicitor to the Board of Trade.*

A. C.

C. A. 1911 EVE J. *May* 26, 30. C. A. *Dec.* 4, 20.

In re APPLICATIONS OF W. & G. DU CROS, LIMITED.

Trade Mark—Registration—Distinctive Mark—Initial Letters—"W & G"—Motor Cabs—User of Mark—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *s.* 3; *s.* 9, *sub-s.* 5.

Motor cab proprietors in London applied for registration as trade marks of two marks used by them for about three years on and in connection with their motor cabs in London. One mark consisted of the two letters "W" and "G" (joined by the symbol denoting "and") written in a running hand with a thickening of the component parts of each letter and a distorted tail to the "G" ending up under the "W." The other mark consisted of "W & G" in ordinary block letters.

The registrar refused the application, and on appeal to Eve J. his decision was affirmed.

On appeal to the Court of Appeal:—

Held by Cozens-Hardy M.R. and Farwell L.J., that in respect of the former mark (*dubitante* Farwell L.J.), but not the latter one, the applicants should be allowed to proceed towards the second stage towards registration, when, after advertisements had been issued and opponents heard, the registrar would be in a better position to decide whether registration should be permitted.

Per Fletcher Moulton L.J.: The applicants should be allowed to proceed in respect of both the marks.

The decision of Eve J. varied.

THIS was an application by Messrs. W. & G. Du Cros, Limited, motor car dealers and motor cab proprietors, of 14, Regent Street, London, S.W., for an order upon the Registrar of Trade Marks to proceed with the registration of two marks in respect of motor vehicles in class 22. The first mark, No. 328,990, consisted of the two letters "W" and "G" (joined by the symbol denoting "and") written in a running hand with a thickening of the

component parts of each letter and a distorted tail to the "G" ending up under the "W." The second, No. 328,991, was for the letters "W & G" printed in ordinary type. The question was whether the letters in question could be held to constitute a "distinctive mark" within s. 9, sub-s. 5, of the Act of 1905.

There was evidence that the applicants had commenced business in 1908 and had acquired some 1300 motor cabs for public use in and around London; and they were distinguished by the lettering "W & G" in the written form painted on the door panels and lettered in brass on the radiator in front of the cab.

The drivers also wore the letters "W" and "G" on their coats and caps, and the cabs were distinguished by the police and the public by these letters, and were so advertised in price lists, pamphlets, and other printed matter.

On the question coming before the Comptroller-General on April 25, 1911, in giving his reasons for refusing the applications, he stated that although letters per se were not adapted to distinguish the goods of one trader from those of another, yet, in the face of s. 3 of the Act, it would be difficult to exclude letters wholly from the category of registrable trade marks; but very strong evidence would be required before it could be held that marks consisting of letters alone could be distinctive. Evidence of very wide and extensive user must be put forward. After careful consideration of the evidence, he came to the conclusion that it was not sufficient to shew that the mark had obtained an acquired distinctiveness. The motor cabs of the applicants were perhaps well known in London, but there was no evidence that they were well known in any other part of the country. The fact of registering these letters would be to prevent persons possessing the same initials from using them on motor cabs in any part of the country. In the circumstances, he was not satisfied that the mark was distinctive, and refused the applications in respect of both marks. The present application was an appeal from that decision, and came on before Eve J. on May 26, 1911.

A. J. Walter, K.C., and *D. M. Kerly*, for the motion. Prior to the Trade Marks Act, 1905, mere letters were not capable of

C. A. 1911 — APPLICATIONS OF W. & G. DU CROS, LIMITED, *In re.*

being registered as trade marks. Now they can be. By s. 3 of the Trade Marks Act, 1905, a mark is defined to include, amongst other things, "a letter, numeral, or any combination thereof." The combination of the two letters W and G in the present cases constitutes a "distinctive mark," which can be registered under sub-s. 5 of s. 9 of the Act, and comes within the words "any other distinctive mark." On the evidence the mark is adapted to distinguish the motor cabs belonging to the applicants from those of other makers. Letters have been registered as trade marks, such as "A. B. C." in *In re Albert Baker & Co.'s Application.* (1) There was also a case, under the old Act; of *In re Verschure and Zoon's Application* (2), where "Vezet" was allowed to be registered, the applicants being the registered proprietors of an old trade mark "V. Z." The present application is not like that in the "Perfection" case, *In re Joseph Crosfield & Sons, Ld.* (3), where the attempt was made to abstract from current common use a word which for other purposes was in current use. The reasons given here by the Comptroller for refusing to register are insufficient. There is no foundation in law for the proposition that, because W and G are letters of the alphabet which somebody in the future may want to use, they cannot be distinctive.

Sir John Simon, S.-G., and *Sargant*, for the Board of Trade. This mark is not distinctive. If it is registered other traders all over the kingdom will be prevented from using the letters W and G on motors. There is no case in which it has been held as a clear decision that letters are properly to be registered. There are cases where old letters have acquired a status which entitled them to registration, and there are cases where they are part of a device. The decision of the Comptroller was right that this mark has not the element of distinctiveness. In these applications the future has also to be considered: *In re California Fig Syrup Co.* (4)

A. J. Walter, K.C., in reply.

Cur. adv. vult.

(1) [1908] 2 Ch. 86.
(2) (1905) 22 Rep. Pat. Cas. 568.
(3) [1910] 1 Ch. 130.
(4) [1910] 1 Ch. 130, 154.

C. A. 1911

APPLICATIONS OF W. & G. DU CROS, LIMITED, *In re.*

May 30. EVE J. This is a motion on the part of W. & G. Du Cros, Limited, for an order that the Registrar of Trade Marks may be directed to proceed with two applications for the registration of trade marks. The marks in question consist of the two letters W and G joined by the symbol denoting the copulative conjunction.

The only difference between the two marks is that in the one case the mark is in ordinary block letters; in the other it is portrayed in a running hand at an angle from the horizontal, with an exaggerated thickening of the component parts of each letter, and what I may perhaps describe as a distorted tail to the G. The applicants seek to register the marks in class 22 in respect of motor vehicles included in that class. The marks, if registrable at all, must be registrable as "distinctive marks" under sub-s. 5 of s. 9 of the Act of 1905.

On behalf of the Comptroller it is contended that neither of the marks is a distinctive mark within the sub-section, and he opposes any order being made upon the motion. It will be convenient, I think, if I deal first with the application to register the mark comprising the plain block letters, and I think the proper way to approach the inquiry whether such a mark is distinctive—that is, adapted to distinguish the motor vehicles on which it is contemplated to place it from the motor vehicles of other manufacturers or proprietors—is first to determine whether distinctiveness is, as Fletcher Moulton L.J. puts it (1), an innate quality of the mark. It is to be observed that although the mark constitutes a part of the applicants' name, it is only a part and, if one were to estimate the comparative values of the component parts of the name, a part which is probably much less likely to disclose identity or be recognized as indicating the origin of the goods than the part which includes the surname Du Cros. Again, there is no originality, no invention, no attractive or even eccentric combination about the mark, nothing in it to attract the eye or strike the ear when vocalized. It comes to this: Can any two letters of the alphabet—and in particular two letters neither of which is by any means uncommon as the initial letter of surnames—joined by the symbol for the

(1) [1910] 1 Ch. 147.

†

C. A. 1911 — APPLICATIONS OF W. & G. DU CROS, LIMITED, *In re.* — Eve J.

conjunctive "and"—apart from all question whether they have been so used as in fact to have become distinctive of particular goods—fairly be said to possess the innate quality of distinctiveness? Prima facie I do not think they can; and I say prima facie because I want to guard myself against a too general expression of opinion. There may, for example, be cases where a trader himself has come to be identified by the initial letters of his trading name, and in such a case it may well be that these initial letters, even if never theretofore used as a mark, might properly be said to possess an innate distinctiveness. But in the absence of peculiar circumstances I do not, as at present advised, think any two letters of the alphabet, whether joined by the copulative or not, can be said per se to be distinctive. So much for the mark made up of the block letters. Can the other mark be said to possess qualities making it innately distinctive? I have felt some doubt as to this, but, on the whole, have come to the conclusion that it cannot. Except for the ugly distortion of the tail of the letter "G" there is nothing unusual or remarkable in the mark. But it is to be remembered, and this applies more particularly to this latter mark, that, as Fletcher Moulton L.J. pointed out in the same passage as that to which I have already alluded (1), distinctiveness is an attribute which can be acquired—it need not necessarily be innate. I have, therefore, to consider the further question whether in this case the mark has come to possess this acquired distinctiveness. It appears from the evidence that the applicants embarked on the business of motor cab proprietors in 1908, and that they now have 1300 motor cabs plying for hire in and around London. In two places on each cab, and on the cap and coat of each driver, is the mark "W & G" in the running handwriting to which I have referred. The same mark is used in price lists, advertisements, pamphlets, notepaper, and other stationery and printed matter. The cabs are known to the police, to hotel, club, and restaurant attendants, and to some of the public who use them as "W & G cabs," and are so spoken of and ordered. This evidence goes to prove and does prove the existence of some acquired distinctiveness, but the mere

(1) [1910] 1 Ch. 147.

existence of acquired distinctiveness does not, in itself, conclude the matter, or make the mark registrable (see per Cozens-Hardy, M.R. (1)). Regard must be had to all the circumstances, and I think in the present case, were I to hold that the required distinctiveness here proved had established a prima facie right to a monopoly for all motor vehicles all over the kingdom, I should be giving to a user restricted in area, and by what, after all, is numerically a very insignificant part of the community, a force and effect out of all proportion to its merits.

C. A. 1911 — APPLICATIONS OF W. & G. DU CROS, LIMITED, *In re.* — Eve J.

In my opinion, therefore, the decision of the Comptroller was right, and I refuse the motion with costs.

G. M.

The applicants for registration appealed to the Court of Appeal, and the appeal was heard on December 4, 1911.

C. A.

Sir Robert Finlay, K.C., *A. J. Walter, K.C.*, and *D. M. Kerly*, for the appellants. Whatever may be said about the mark in block, the other mark is clearly a distinctive one. The appeal from the Comptroller to the Court below was brought under s. 12 of the Act of 1905, and Eve J. affirmed the Comptroller's decision. Sect. 3 defines a "registrable trade mark" as "a trade mark which is capable of registration under the provisions of this Act," and s. 9 says that "a registrable trade mark must contain or consist of at least one of the following essential particulars," that is to say, a name, a signature, an invented word, a non-descriptive non-geographical word, not being a surname, or "(5.) Any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in the above paragraphs (1.), (2.), (3.), and (4.), shall not, except by order of the Board of Trade or the Court, be deemed a distinctive mark." Then s. 9 contains a proviso as to old distinctive words in use before 1875, and proceeds to enact that "for the purposes of this section 'distinctive' shall mean adapted to distinguish the goods of the proprietor of the trade mark from those of other persons," and that "in determining whether a trade mark is so adapted, the tribunal may, in the case of a trade mark in actual use, take into

(1) [1910] 1 Ch. 141.

C. A. 1911 — APPLICATIONS OF W. & G. DU CROS, LIMITED, *In re*.

consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered or proposed to be registered." The letters "W & G," whether in block or flourish, distinguish the motors of the appellants from those of other persons.

[COZENS-HARDY M.R. Sect. 9, sub-s. 5, was much discussed in *In re Joseph Crosfield & Sons, Ld.* (1)]

There it was decided that a mere laudatory epithet—such as the word "Perfection" when applied to soap—cannot acquire by user the quality of distinctiveness so as to render it capable of registration. The marks "W & G" have acquired distinctiveness in London, although it was admitted before the Comptroller that they had not done so out of London. The Comptroller in his statement does not make any special reference to what may be called the flourishing letters; but certainly no one except the appellants could honestly use these letters on motor vehicles. The case of *Weingarten Brothers* v. *Charles Bayer & Co.* (2) supports our contention. The objection that the mark only consists of letters is not of itself sufficient: *In re Verschure and Zoon's Application* (3); *In re Albert Baker & Co.'s Application.* (4)

[FARWELL L.J. referred to *Cellular Clothing Co.* v. *Maxton & Murray.* (5)]

Distinctiveness in a mark may be derived from the way in which it appeals to the eye. "W & G" are letters not hitherto used by any other traders, at any rate in connection with motors, and we ought to be allowed to register both the marks. [They also referred to *Birmingham Small Arms Co.* v. *Webb & Co.* (6); *In re Birmingham Small Arms Company's Application* (7); *A. Boake, Roberts & Co.* v. *W. A. Wayland & Co.* (8)]

Sir John Simon, S.-G., and *Sargant*, for the Board of Trade. The Legislature has not said that if a mark has in fact become distinctive it is in all cases to be regarded and adapted to distinguish; it is a question for the judge in each case, having regard to the extent of user: *In re Joseph Crosfield & Sons, Ld.* (9)

(1) [1910] 1 Ch. 130.
(2) (1905) 22 Rep. Pat. Cas. 341, 344, 345.
(3) 22 Rep. Pat. Cas. 568.
(4) [1908] 2 Ch. 86.
(5) [1899] A. C. 326.
(6) (1906) 24 Rep. Pat. Cas. 27.
(7) [1907] 2 Ch. 396.
(8) (1909) 26 Rep. Pat. Cas. 251.
(9) [1910] 1 Ch. 130, 154.

The Court must have regard to the future. We do not say that in no case can a combination of letters be registered. There are three questions for consideration: (1.) Is the mark innately distinctive? (2.) Is it capable of becoming distinctive? (3.) Is it in fact distinctive? On question (1.) there is the further question, whether the mark is denotative as opposed to connotative. The judgments in *In re Joseph Crosfield & Sons, Ld.* (1) lay down a wider principle than that relating to laudatory epithets.

There is a strong objection to allowing initial letters to be used as trade marks. There are only twenty-six letters in our alphabet, and if combinations of these letters can be registered, we shall have persons getting into trouble hereafter—not because they have imitated, but because they have simply acted in the ordinary course of business. The Comptroller declines to register, not so much because a combination of letters is against the law, but because "W & G" belongs to other persons besides the appellants—for instance Willcox & Gibbs.

[COZENS-HARDY M.R. referred to *Motley* v. *Downman* (2) and *Millington* v. *Fox.* (3)]

The Comptroller has exercised his discretion, and the Court ought not lightly to interfere with it.

[Reference was also made to *Eno* v. *Dunn* (4) and *In re Farbenfabriken Application.* (5)]

A. J. Walter, K.C., in reply.

Cur. adv. vult.

Dec. 20. COZENS-HARDY M.R. This appeal from a decision of Eve J., confirming a refusal by the Comptroller to allow the appellants to proceed with their applications to register two trade marks in class 22, raises an important question. The first mark (328,990) consists of the letters "W & G" written in a peculiar style and with a considerable flourish. It has been used in the metropolis for three years, and there is evidence that the applicants' cabs or taxis are known by the public and the trade as "W & G" cabs or taxis. The second mark (328,991) consists

(1) [1910] 1 Ch. 130.
(2) (1837) 3 My. & Cr. 1.
(3) (1838) 3 My. & Cr. 338.
(4) (1890) 15 App. Cas. 252.
(5) [1894] 1 Ch. 645.

C. A. 1911

APPLICATIONS OF W. & G. DU CROS, LIMITED, *In re.*

Cozens-Hardy M.R.

solely of W & G in ordinary block letters. It has never been used by the applicants.

Now it is well settled that at common law, and apart from the statutes relating to registration, a trader by long user might establish a title to a trade mark consisting of letters only. Perhaps "L.L.," as applied to whisky, is the best known example. (1) But the very leading case of *Millington* v. *Fox* (2) furnishes another example.

The Legislature when establishing a register did not (except as to old marks) allow the registration of mere letters. This continued until the Act of 1905. It is plain that under s. 3 a mark consisting of letters is not incapable of registration. But it is equally plain that under s. 9, sub-s. 5, such a mark cannot be registered as of right. The Board of Trade or the Court must deem it a distinctive mark. "Distinctive" means adapted to distinguish the goods of the proprietor of the trade mark from those of other persons, by which I understand not only persons at present in the trade, but also persons who may in the future embark in the trade. And then follows an important proviso that where the trade mark is in actual use, the tribunal "may"—and I think *should* — take into consideration the extent to which such user has rendered the trade mark in fact distinctive.

In my opinion, the first mark may possibly be supported as a "device" within s. 3. But, if not, I think the evidence of user for three years, though limited in area and not large in amount, is sufficient to entitle the applicants to be allowed to proceed to the second stage, when advertisements will be issued and opponents will be heard, and the Comptroller will then be in a better position to decide whether registration should be permitted.

The second mark seems to me to stand in a different position. There has been no user. I cannot say that two letters in ordinary type with a copulative sign are necessarily or even probably distinctive. The registration of W & G, which is not the name of the company, would prevent any firm having those initials and desirous of trading in articles falling within class 22 from

(1) (1863) *Kinahan* v. *Bolton*, 15 Ir. Ch. Rep. 75.

(2) 3 My. & Cr. 338.

using their own initials upon or in connection with their own goods. The Solicitor-General instanced Willcox & Gibbs, and many other combinations might be suggested. In my opinion this is an illegitimate attempt to take exclusive possession of a part of the alphabet to the detriment of future traders who may honestly desire to put their own initials on their own goods. The Comptroller plainly has a discretion under the last words of s. 9 where there has been actual user, and he can scarcely have a less discretion—indeed I think he ought to have a wider discretion—where there has been no user.

I do not understand the Comptroller as laying down a principle that under no circumstances can two letters be distinctive. If he did, I should not agree with him. It may well be that some combination of two letters—such as Z and Y—might be so peculiar and so unlikely to represent the initials of a firm as to induce the tribunal to conclude that it is prima facie "distinctive," although a different conclusion might be arrived at with reference to W & G. Each case must depend upon its particular facts. Wherever there is some substantial evidence of distinctiveness in fact, the prima facie view that the letters are not distinctive may require further consideration, and in such a case it is right to allow the application to proceed to the second stage. Where there is no such evidence, and the persons who may be prejudiced are wholly or mainly future traders, not present traders, advertisements would be of little value. The Comptroller must be able to exercise his discretion at the first stage, and I see no advantage in allowing the application to proceed to the second stage.

The result is that, in my opinion, the appeal succeeds as to the first mark, but fails as to the second mark.

FLETCHER MOULTON L.J. In this case W. & G. Du Cros, Limited, have applied for the registration of two marks under class 22 for motor vehicles. Of these the one, No. 328,991, is "W & G" in block letters, the other, No. 328,990, is "W & G" written in a peculiar manner. The Comptroller-General has refused to allow either of these two applications to proceed, and has given his reasons for so doing in writing, as provided by the Act. The appellants moved the Court on appeal and

C. A. 1911

APPLICATIONS OF W. & G. DU CROS, LIMITED, *In re.*

Fletcher Moulton L.J.

Eve J. sustained the decision of the Comptroller-General, and from that decision the present appeal is brought. The ground of the refusal of the Comptroller-General to allow the applications to proceed is in substance that the letters "W & G" do not constitute a distinctive mark, and, read fairly, his decision amounts to saying that no two letters can constitute a distinctive mark. It is true that he does not absolutely commit himself to such a finding, but, seeing that there is no evidence whatever against the particular combination applied for in the present case, and no peculiarity in the two letters chosen making this combination more or less distinctive than a combination of any two other letters, his decision is tantamount to a decision that he will permit the registration of no combination of two letters as a distinctive mark even though in words he abstains from so formulating it. In my opinion, there is no ground whatever justifying such a decision.

From the earliest times in the history of English trade mark law it has been acknowledged by the Courts that letters and combinations of letters can be good trade marks. In the famous case of *Millington* v. *Fox* (1), which is often referred to as being the foundation of this branch of our law, the trade mark consisted of the letters "I. H.," and in the still earlier case of *Motley* v. *Downman* (2) Lord Cottenham upheld the trade mark "M. C." Even apart from these decisions, which are of the highest authority, the proposition that a combination of two letters cannot be a distinctive trade mark has no justification either in practice or in reason. No trade mark is better known than the trade mark "L.L." for whisky, those letters having been taken originally as the initials of Lord Lieutenant. In some trades to my own knowledge, as for example the corset trade, trade marks usually take the form of two letters, such as "Y. & N.," "C. B.," &c., and they are universally recognized as distinguishing the goods of the owners of the trade marks. Such combinations may in some cases be the initials of the members of the firm or of some one of its predecessors, but in my opinion it is immaterial whether this is or is not the case. The question is whether the combination is a distinguishing mark, and the

(1) 3 My. & Cr. 338. (2) 3 My. & Cr. 1.

reason for which the particular letters forming the combination were selected cannot affect the answer to that question in any way. Speaking for myself, I can imagine no better or more effective way of marking a man's goods than by a special combination of letters, inasmuch as it has the advantage of being remembered by the ear as well as by the eye. To say that such a mark in general is not distinctive, that is, according to the definition "not adapted to distinguish the goods of the proprietor of the trade mark from those of other persons," is to my mind an impossible proposition. If it be a man's trade mark—i.e., if he alone has the right to use the combination as a trade mark on his goods—no type of mark could better or more readily distinguish his goods from those of other people.

But the history of the legislation with regard to trade marks puts such trade marks in a still stronger position. As I have said, letter trade marks date from the earliest times, when the rights of a trade mark depended entirely on its having become by user a mark distinctive of the goods of the person claiming it. No registration existed at that time, and therefore it was only by the fact that the mark distinguished the goods that rights could be acquired. When the first Registration Act was passed in 1876, the Legislature, in my opinion unfortunately, gave the rights of registration only to particular types of future trade marks, and in such types they did not include letters or combinations of letters. Such trade marks, therefore, could not be registered unless they had been in use as trade marks prior to the date of the Act, but if they had been so in use, they might be registered. They were in this disadvantageous position as to registration until the passing of the Trade Marks Act, 1905, which extended the definition of trade marks to letters and combinations of letters and allowed them to be registered, making no distinction between them and any other distinctive trade marks. It is clear, therefore, that by that Act the Legislature expressed its intention in future to permit letters and combinations of letters to be adopted as new trade marks, and to enjoy the privilege of registration. In this and in other ways it evidenced by that Act that it had abandoned to a great extent its former policy of trying to put

C. A. 1911

APPLICATIONS OF W. & G. DU CROS, LIMITED, *In re.*

Fletcher Moulton L.J.

pressure on the trader as to the type of the mark which he should select to distinguish his goods. Under these circumstances it is not, in my opinion, open to any official of the Patent Office to lay down as a rule that any particular type of mark which is in fact capable of distinguishing the goods of the person using it as a trade mark shall not be registered—provided always that the mark is proper on other grounds. Matters such as these are settled by the Legislature and not by officials.

In my opinion, therefore, it was the duty of the Comptroller-General to permit the application to proceed. It may very well be that there would be opposition, and it might be shewn that this particular combination of letters would in that particular trade (i.e., as applied to motor vehicles) be objectionable on grounds peculiar to itself, such as by reason of its resembling too closely the trade marks of other people. In such a case it would be open to the Comptroller-General to refuse to register the mark. But to stop it in limine, merely because he has an objection to this class of distinctive mark and would prefer to keep such marks off the register, is in my opinion to exceed his jurisdiction.

It will be seen that I have treated these as ordinary applications to register these marks under s. 9, sub-s. 5, as distinctive marks. Such is, in my opinion, the character of the applications. There was no necessity for the applicants to file evidence as to past user of either of the marks, because prima facie a combination of two letters is a distinctive mark. But it was open to them to file such evidence, if they wished so to do, by reason of the last paragraph of the section, and, so far as that evidence goes, it is in favour of the application to which it refers, because it establishes that where used the combination has proved itself distinctive. But the filing of that evidence has, in my opinion, led the Comptroller-General and Eve J. to imagine that the claim of such a combination of letters to distinctiveness depends on proof that it has become distinctive. To my mind this is not the case. Such combinations are distinctive unless, from the circumstances of the trade, it can be shewn that the particular combination is not so, and the rights of the applicants would not in my opinion be different to any substantial extent if the mark was only proposed to be used by them and had not already been used.

Frequent reference was made during the argument to the judgments in the *Perfection Case*. (1) To my mind they do not touch the present question. In the *Perfection Case* (1) the trade mark which it was sought to register was a well-known English word. It was not suggested that prima facie it possessed distinctiveness in any degree whatever. The whole question was whether it had acquired it by user. It was this question and no other that the judgments in that case had in view. Word marks may have innate distinctiveness, as for instance when they have no reference whatever to the character or quality of the goods, so that their connection with them is wholly capricious and fanciful. "Bluebeard" as applied to coffee might be taken as an example of this. But they may also obtain an acquired distinctiveness by user, and the judgments in the *Perfection Case* (1) dealt solely with the conditions under which an adequate distinctiveness may thus be acquired. But a mark such as a combination of single letters unquestionably possesses distinctiveness prima facie. If a person puts "L.L." on his whisky, it is beyond controversy that it distinguishes his goods just as truly as if he puts three stars or a block triangle. Any objection to such a mark must be special and will be investigated at a later stage. There is no warrant in the statute for shutting them out as a class.

One point, however, remains to be considered. Counsel for the respondents attempted to defend the action of the Comptroller-General by saying that the registration of a trade mark is not ex debito justitiæ, basing their argument on the dicta of Lord Herschell in the case of *Eno* v. *Dunn*. (2) That is true, but it does not mean that the Comptroller-General has a discretion to register a trade mark or not register it, according as he thinks it is a desirable form of trade mark or not. Such limitations must be found in the Act if they are to be enforced by the office. The true doctrine in this respect is that enunciated by Lindley L.J. in the *Somatose Case* (3), where, in speaking of the discretion given to the Comptroller, he says: "It would clearly justify the rejection of any trade mark, even if it contains one

(1) [1910] 1 Ch. 130. (2) 15 App. Cas. 252.
(3) [1894] 1 Ch. 645, 652.

C. A. 1911

APPLICATIONS OF W. & G. DU CROS, LIMITED, *In re.*

Fletcher Moulton L.J.

of the statutory requisites, if such mark be of an indecent or libellous character, or if it infringes the right of some other person, or if it is identical with or so similar to one already registered as to be calculated to deceive. But I can find no other restriction; and if a person seeks to register a trade mark which is open to none of these objections, and which does contain one of the essentials mentioned in s. 10 of the Act of 1888"—the Act then in force—"I am aware of no legal principle which would justify the Court in refusing to direct its registration." It is true that this judgment was a dissentient judgment, but it is also true that the judgment of the majority of the Court is clearly inconsistent with the subsequent judgments of the House of Lords in the *Solio Case* (1), and that it must be taken that in this case the dissentient judgment was the correct one, and "Somatose" has accordingly since been put on the register. Moreover, the other Lords Justices did not express any dissent from the law laid down by Lindley L.J. on this particular point, and it has not to my knowledge ever been doubted or differed from.

But even if I considered that the Comptroller-General possessed a wider discretion than the above, I should still be of opinion that the Court ought to allow this appeal. To my mind the Comptroller-General is in effect taking the advice of the Court upon an important question as to his duties in the interpretation of the Act for his future guidance. He has stopped this application in limine solely because it is a combination of two letters. We are to say whether that is a proper exercise of whatever judicial discretion is vested in him. The Court does not hesitate to review the exercise of his discretion even when it concerns only one particular mark. How much stronger is its duty to examine and decide upon an exercise of his discretion, which is in effect the establishment (without warrant in the Act) of a general exclusion of a certain definite type of mark from the privileges of registration. If we consider that a mark so constituted is prima facie distinctive, and therefore is entitled to be examined on its merits, it is in my opinion our duty to set aside a decision which is based on the principle that it is not so.

(1) *Eastman Photographic Materials Co.* v. *Comptroller-General* [1898] A. C. 571.

So far I have not distinguished between the two applications. But with regard to the one which is in script, I am of opinion that it would be registrable as a device apart from the question of its consisting of the combination of two letters. The writing is peculiar, and it would form a good mark just as the words "Erect form," in a peculiar script, is a registered trade mark for a certain description of corsets. I entirely fail to understand the suggestion that it is objectionable because you can read it and when read it is "W & G." The Act specially selects as permissible trade marks the name of a company, individual, or firm represented in a special or particular manner, and the signature of the applicant for registration or some predecessor in his business. Both these can be read just as if they were printed or in ordinary type. It is evident, therefore, that the fact that a trade mark can be read, and that, as pronounced, it does not possess the peculiarities which distinguish it as a device, is no objection to its being registered as a trade mark.

I am of opinion, therefore, that both these applications ought to have been allowed to proceed, and that these appeals should be allowed.

FARWELL L.J. Long before the Trade Mark Acts and apart from any question of registration thereunder, it is clear that a letter or letters might have been so used as to constitute a trade mark. In *Kinahan* v. *Bolton* (1) the Lord Chancellor, Sir Maziere Brady, after referring to the evidence that "the whisky under the name of 'L.L.' is a well-known article of commerce; that it has no other name than 'L.L.'; that under this name it has acquired an especial reputation, and that for the long period of forty years this name has been applied to it," goes on to say: "What is a trade mark more than that? It is proved that these two letters designate this whisky. The letters of themselves mean nothing; no one a priori could know the meaning of such a trade mark; it is merely like a diamond, an anchor, or a crown stamped on any article—the mark by which the vendor enables the public to recognise his wares."

With respect to registration, whatever may have been the case

(1) 15 Ir. Ch. Rep. 75, 79.

C. A. 1911

APPLICATIONS OF W. & G. DU CROS, LIMITED, *In re.*

Farwell L.J.

prior to the Act of 1905, s. 3 of that Act expressly provides that "mark" shall include "letter"; but this, although it enables a letter or letters to be registered, does not necessarily make any particular letter or letters a "registrable trade mark." In order to become so it must be distinctive under s. 9, sub-s. 5, i.e., adapted to distinguish the goods of the proprietor of the trade mark from those of other persons, and whether it is so adapted or not is for the decision of the tribunal mentioned in this clause. And if the mark is one in actual use, the tribunal has to consider the extent of user: if it is a new mark, theretofore unused, it is left to the tribunal to decide without any special directions in the Act to guide them. This tribunal is the registrar with an appeal to the Board of Trade or to the Court: s. 12. Now it appears to me as impossible to say that letters may not be adapted to distinguish as it is to say that mere laudatory epithets, "good," "best," and the like, may be so adapted; but this does not conclude the matter. A trader has no absolute right to register any trade mark: the words of Lord Herschell in *Eno* v. *Dunn* (1) apply as much to the present as they did to the former Acts. "Whilst he"—the Comptroller—"is in certain cases prohibited from registering, a discretion whether to register or not appears to me to be in all cases plainly conferred. Of course this discretion must be reasonably and not capriciously exercised."

This was somewhat expanded by Lindley L.J. in *In re Farbenfabriken Application* (2), in words which, although in a dissentient judgment, have generally been accepted as correct, and Fletcher Moulton L.J. in "*Perfection*" (3) adds another material consideration: "The Court will therefore do well to ask itself the question, Will the registration of the trade mark cause substantial difficulty or confusion in view of these rights of user by other traders? If the answer is in the affirmative, the Court will probably hesitate to allow the word to be registered." He was dealing with the registration of a word, but his remarks also apply, although not so pointedly, to a letter of the alphabet in common use by all the world.

There are then two questions to be considered—(1.) the general

(1) 15 App. Cas. 261.
(2) [1894] 1 Ch. 652.
(3) [1910] 1 Ch. 148.

question, are letters adapted to distinguish at all? (2.) if so, were the particular letters in question so adapted, having regard to all the circumstances of the case and the rights of other traders present and future? It was argued that the registrar had decided the first question in the negative. If he had done so, he would, in my opinion, have been wrong, and the matter would not be one of discretion but of misconstruction of the Act. I do not, however, so read his decision, but I understand him to have dealt with the second question and answered it in the negative. If this be so, I think it is a case of the exercise of his discretion, with which this Court ought not to interfere except on the grounds on which we interfere with the exercise of any judicial discretion, nor indeed am I prepared to say that he has not exercised his discretion wisely and rightly. The applicants are seeking to obtain for their motors a monopoly of the letters W & G throughout the whole of the United Kingdom for all time: their evidence of user is confined to three years in London. It is the common practice of tradesmen and manufacturers to put the initials of their firms on their goods, their invoices, and letter paper, and to use such initials in various modes. If a firm of Williams & Graham, or Wilson & Gordon, or any other of the thousands of persons whose names begin with W and G were to set up as motor car makers or proprietors in the north or west or east of England or Wales, or in Scotland or Ireland, the registration of the applicants' W & G would prevent such firms, although perfectly honest, and ignorant of the applicants' mark, and in no way directly competing with them, from using their own initials at all in connection with their trade. I cannot say that the registrar was wrong in taking these matters into consideration. His refusal does not in any way prevent the applicants from enforcing all their rights at common law and in equity against persons who wrong them by imitating their device so as to represent that their cars are the applicants', but the very extent and magnitude of the additional rights given by registration render it incumbent on the registrar to be cautious how he allows the applicants to add them to their existing rights. It is the extreme probability, amounting almost to certainty, that there will be other honest traders who will be unduly hampered

C. A. 1911 — APPLICATIONS OF W. & G. DU CROS, LIMITED, *In re.* — Farwell L.J.

by the registration that influences me: if the letters had been W X Y Z, I should probably think there was no sufficient likelihood of inconvenience.

I cannot myself see any ground for making any distinction between the two trade marks claimed. The applicants are not willing to limit themselves to the peculiar form of writing in the first: they claim the letters W & G, however written, and quite as much when used orally as when depicted graphically, and oral use has no means of giving effect to the caudal eccentricity of the G in the first mark, and this may lead to confusion in a way in which a written signature would not. But there may be other grounds on which letters so formed as to be a device rather than a mere letter might be registered and there has been some user of the letters so written.

It is said that the registrar should have allowed the whole application to proceed, and have dealt with it after inviting and hearing opposition: I see no ground for his so doing with regard to the plain letters of which no user was proved. His function is to protect the interests of the public, present and future; the motor trade is still comparatively a young industry, and it may well be that no existing trader may care to contest the matter. The applicants have put in their evidence, and I think that the registrar has adopted the better course by making a short end of the matter. But with respect to the written letters, as my brethren think that he should allow the application to proceed with regard thereto, I will not dissent. He may, of course, ultimately reject them: I only agree to the applicants being permitted to go on with their case on these, and not being stopped in limine thereon. In other respects I think that Eve J. was quite right in affirming the registrar.

No costs of the appeal were given.

Solicitors for appellants: *John B. & F. Purchase.*
Solicitor for respondent: *Solicitor to the Board of Trade.*

F. E.

POCOCK *v.* CARTER.

NEVILLE J.

1912

Feb. 21.

[1907 P. 2838.]

Partnership — Business Premises the Property of one Partner — No Special Provision as to Tenancy—All Rent to be paid out of Profits—Tenancy implied—Tenancy during Continuance of Partnership.

Where the premises upon which a partnership business is carried on are, and are declared by the partnership deed to be, the property of one partner, and the partnership deed contains no provision as to the tenancy of the partnership, but only a general direction that all rent is to be paid out of profits, the Court will infer that the partnership was intended to hold the premises on a tenancy during the continuance of the partnership and not on a tenancy from year to year or at will.

By an indenture of partnership dated November 12, 1905, and made between Susan Pocock, widow, of the first part, Joseph Carter of the second part, and Edwin Pocock of the third part, it was agreed that the three parties should be and remain partners in the business of tailors and outfitters at Salisbury for the term of the life of the said Susan Pocock. The partnership deed contained the following provisions :—

"5. The stock in trade and the lease of the premises in which the business is carried on are the property of the said Susan Pocock. Such stock is to be renewed as occasion requires out of the profits of the partnership.

"6. All rent rates taxes and all outgoings wages and expenses attending the carrying on of the business or incidental thereto shall be paid out of the yearly profits before division.

"7. After making such payments the profits shall be paid to the three partners in equal shares."

It was also provided that the said Joseph Carter should have the management of the said business and diligently and faithfully employ himself therein and manage and conduct the same for the greatest benefit and advantage of the partnership without payment for such services, he taking a share in such profits as above mentioned, and that the said Joseph Carter should occupy the house and premises in which the said business was carried on free of any rent or payment of any kind.

Susan Pocock was lessee of the business premises under an

NEVILLE J. 1912 POCOCK v. CARTER.

indenture of lease dated June 1, 1903, for fifteen and three-quarter years from December 25, 1901, at a yearly rent of 125*l.* Until the sale hereinafter mentioned the rent was duly paid by the partnership. On December 14, 1907, Susan Pocock brought an action against her co-partners for partnership accounts, and on December 15, 1908, judgment was given directing the usual accounts. Pursuant to an order in this action the book debts, trade fixtures, and articles used in the said business as on September 29, 1910, were sold by private tender, and the defendant, Joseph Carter, was the purchaser. By the conditions of sale the purchaser was to have possession and pay his purchase-money into Court on October 20, 1910. The sale did not include any interest in the premises upon which the business was carried on.

The plaintiff, Susan Pocock, died in 1911, and the action was by order carried on by her legal personal representatives.

By a second certificate in the action filed December 1, 1911, the Master certified that there was due from the partnership to the late plaintiff a sum of 95*l.* 16*s.* 2*d.* for rent of the partnership premises down to November 12, 1911. This sum was arrived at by treating the partnership as having held the premises from Susan Pocock on a tenancy from year to year commencing on November 12, and, therefore, not determinable except on that day. This summons was taken out by Joseph Carter to vary the Master's certificate by striking out this sum on the ground that no rent was payable after October 20, 1910.

The partnership business was in fact the continuation of a business formerly carried on in partnership between Edwin Pocock, the deceased husband of Susan Pocock, and Joseph Carter. The original articles of partnership contained provisions as to the partnership premises, which Edwin Pocock then held under a previous lease, similar to those contained in the present partnership deed. There was some evidence that Edwin Pocock had refused to give the original partnership any tenancy in the premises.

Baker-Wilbraham (*Sargant* with him), for the summons. If a partnership carries on business on premises belonging to one

partner, and there is no special provision for a tenancy, the inference may be that the property is the property of the partnership, or that it continues the property of the partner; but in the latter case the partnership has a mere tenancy at will. The proposition is clearly stated in Lindley on Partnership, 7th ed. p. 367, note (*a*): "If there is no lease and the firm is dissolved, the owner can eject his late partners without notice to quit," and the author cites *Doe* v. *Bluck* (1); *Benham* v. *Gray*. (2)

There is no reported case where a tenancy from year to year was inferred in the case of a partnership.

Frederic Thompson, for the plaintiffs. The cases cited for that proposition do not establish it. In both cases the letting to the partnership was of part of the premises comprised in the lease only, and in *Burdon* v. *Barkus* (3) the proposition is stated as only applying to cases where a part of the premises only is let to the partnership. In *Doe* v. *Miles* (4), also cited in the same note, there was a special agreement that the house which was the property of one partner should be used by the partnership during the partnership. I submit that those cases have nothing to do with this one, where the whole house was used and there is no agreement. Prima facie a person who pays a yearly rent is a tenant from year to year, and it would be a great hardship on the partner who owned the premises if any other tenancy were inferred, for he would have the house thrown on his hands without any notice and might have difficulty in letting it.

NEVILLE J. I think the case is really governed by *Burdon* v. *Barkus* (3) and *Benham* v. *Gray*. (2) In those cases the tenancy inferred was a tenancy during the partnership. I thought at first that it was a choice between inferring a tenancy from year to year, or a tenancy at will, but I now think the true inference is that there was intended to be a tenancy during the continuance of the partnership. This inference is equivalent to the express terms of the tenancy which was dealt with in *Doe* v. *Miles* (4), and it appears to be the only inference which will enable the matter to

(1) (1838) 8 C. & P. 464.
(2) (1847) 5 C. B. 138.
(3) (1861) 3 Giff. 412; (1862) 4 D. F. & J. 42.
(4) (1816) 1 Stark. 181.

NEVILLE J. 1912 POCOCK v. CARTER.

be fairly dealt with. Nothing is said in the partnership deed about the terms on which the property was to be held by the partnership though it is plainly intended that the business should be carried on there. It is provided in general terms that all rent, rates, and taxes shall be paid out of profits before division, but there is no specific reference to the rent or tenancy under this particular lease. The rent, however, was paid by the partnership. If I were to hold that there was implied either a tenancy at will or a tenancy from year to year, the partner owning the premises could by giving notice have terminated the agreement before the end of the partnership and turned the other partner out of the premises. That would be a most unsatisfactory position and cannot, I think, have been contemplated by the parties. I must therefore infer that there was a tenancy during the partnership only, which terminated at the dissolution of the partnership on October 20, 1910. The certificate must be varied by striking out the rent except an apportioned rent up to October 20, 1910. The applicant must have his costs in any event.

Solicitors: *Field, Roscoe & Co.; Law & Worssam, for Bond & Pearce, Plymouth.*

J. R. B.

ATTORNEY-GENERAL (at the Relation of the Glamorgan County Council) *v.* PRICE.

[1906 A. 1737.]

C. A. 1912

Feb. 8, 9, 28.

Charity—National School—Conveyance of Site under the Schools Sites Act, 1841 (4 & 5 Vict. c. 38)—Trust for Education of the Poor—School for promoting Education in the Principles of the Established Church—General Intention coupled with Particular Mode—Failure of Particular Mode—Cy-près.

Land was conveyed by a charitable donor under the School Sites Act, 1841, upon trust to permit the buildings to be erected thereon to be for ever used for a school for the education of children and adults or children only of the labouring, manufacturing, and other poorer classes in a certain district. The school was to be in union with and conducted according to the principles of the National Society for Promoting the Education of the Poor in the Principles of the Established Church. The trust deed provided that the school might be used for Sunday school purposes under the control of the clergyman of the parish, and in other respects the management was vested in the clergyman and four members of the Church of England. The school erected on the land was used in accordance with the trusts until 1905, when, in consequence of the inability of the trustees to satisfy the requirements of the education authorities under the Education Act, 1902, it was closed.

In an action for a scheme to regulate and manage the charity:—

Held by Cozens-Hardy M.R. and Fletcher Moulton L.J. (Buckley L.J. dissenting), that the special trusts for carrying on a national school in connection with the Church of England having failed the premises ought, according to the doctrine of cy-près, to be appropriated and used generally for the education (apart from denominational religious instruction) of the class intended to be benefited. It would be contrary to the Schools Sites Act, 1841, to allow the trustees to let the school at a rent to be applied for Church purposes generally. That Act was not limited to education which was both "religious and useful," but extended to purely secular education.

Decision of Swinfen Eady J. reversed.

Per Buckley L.J.: To a charitable endowment for education coupled with a particular denominational religion, education not coupled with religion, or coupled with religion not of that denomination, is not cy-près.

This was an appeal from a decision of Swinfen Eady J. sanctioning a scheme for the regulation and management of the charitable trusts affecting the old national school at Caerphilly in the county of Glamorgan.

C. A. 1912

ATTORNEY-GENERAL v. PRICE.

By deed poll duly executed, acknowledged, and enrolled in Chancery dated December 31, 1867, the Right Hon. Baroness Windsor and the Right Hon. R. C. Herbert and the Earl of Bradford at and by her request and direction and under the authority of the Schools Sites Acts, 1841 and 1844, conveyed to the Reverend Thomas Jenkins, the minister, and W. W. Morgan, the chapel warden of the chapelry district of Caerphilly in the county of Glamorgan, a plot of land in the parish of Eglwysilan to hold unto and to the use of the said minister and chapel warden and their successors for the purposes of the said Acts "Upon trust to permit the said premises and all buildings thereon erected or to be erected to be for ever hereafter appropriated and used as and for a school for the education of children and adults or children only of the labouring manufacturing and other poorer classes in the district of Caerphilly and for no other purpose," and it was declared that such school should be at all times open to the inspection of the inspectors of schools for the time being appointed in conformity with an Order in Council of August 10, 1840, and should always be in union with and conducted according to the principles and in furtherance of the ends and designs of the National Society for Promoting the Education of the Poor in the Principles of the Established Church, and subject to and in conformity with the declaration aforesaid the school and premises were to be controlled and managed as follows, namely, the principal officiating minister of the said district was to have the superintendence of the religious and moral instruction of all the scholars attending such school and might use or direct the premises to be used for the purposes of a Sunday school under his exclusive control and management, but in all other respects the control and management of the school and premises and the appointment and dismissal of the schoolmaster, mistress, and assistants were to be exercised by a committee consisting of the minister and churchwarden, and (if specially appointed) the curate, and four other persons who were to be members of the Church of England and to make a declaration to that effect on appointment. No person could be a master or mistress in the school who should not be a member of the Church of England. A school was duly erected on the land and paid for in part out of a parliamentary grant.

The school was carried on as a public elementary Church school until 1905, when it was closed by reason of the inability of the trustees to comply with the requirements of the local education authority as to repairs and improvements under the Education Act, 1902. The building had since been used for the purposes of a Sunday school, a Church Institute, a class for religious instruction on Saturdays, mothers' meetings, Church Lads' Brigade, Girls' Friendly Society, and other similar purposes of an occasional character.

On November 27, 1906, this action was commenced by the Attorney-General at the relation of the Glamorgan County Council against the trustees asking (inter alia) for the establishment of a scheme for the regulation and management of the charity.

At the trial Swinfen Eady J. by his judgment, pronounced on March 19, 1908, held that the charity founded by the deed poll was a Church of England charity, and he directed a scheme for its regulation and management having regard to the directions in the deed to be settled by the judge.

In pursuance of this judgment the following scheme was drafted by the Attorney-General and submitted to the relators and the trustees:—

1. This scheme shall operate and take effect during such period only as the land and hereditaments comprised in the deed poll of the 31st December, 1867, and the schoolhouse and buildings thereon (all which hereditaments and property are hereinafter called "the school site and buildings") shall not be used for the purposes of a public elementary school and shall also operate and take effect by way only of addition or supplement to the trusts and provisions of the said deed poll and not by way of general revocation of or substitution for such trusts and provisions and accordingly all such trusts and provisions shall remain and be of full force and unaffected except so far as the same are expressly or impliedly added to or supplemented hereby during the period aforesaid (hereinafter called "the operative period").

2. During the operative period the school site and buildings shall (in addition to the use thereof on Sundays for the purposes of a Sunday school under the provisions of the said deed poll)

C. A. 1912

ATTORNEY-GENERAL v. PRICE.

be used on weekdays as follows that is to say:—First and primarily and in priority to all other uses the school site and buildings shall be used on weekdays for such educational purposes in connection with the principles of the Established Church (hereinafter called "Church educational purposes") as may be reasonably determined by the minister and churchwardens of the chapelry district of Caerphilly in the county of Glamorgan for the time being (hereinafter called the trustees) having regard to the provisions and trusts of the said deed poll and secondarily and subject always and without prejudice to the aforesaid primary and overriding user the school site and buildings shall be used on weekdays for such educational purposes not connected with the Established Church or any creed or denomination (hereinafter called "undenominational educational purposes") as may be ascertained and allowed as hereinafter provided.

3. For the purpose of determining the extent and manner to and in which the school site and buildings are to be used for undenominational educational purposes on weekdays the provisions contained in the succeeding clauses shall take effect, that is to say:—

4. The trustees shall from time to time (not being in any case less than one year) furnish to the Glamorganshire County Council or their Education Committee or other the local education authority for the time being (hereinafter called the local education authority) a statement of the manner and extent including times classes and subjects in which the school site and buildings are being used and are proposed to be used on weekdays for Church of England educational purposes and shall give the local education authority any other information with reference to such user that shall be necessary to enable them to judge whether the school site and buildings are available to a substantial extent for undenominational educational purposes.

5. If at any time or from time to time the local education authority shall consider that the existing and proposed user for Church educational purposes is not sufficient to practically exhaust the educational capacity of the school site and buildings but that they can without appreciable interference with such user be also profitably used to a substantial extent for undenominational

educational purposes then and in any such case and so often as the same may happen the local education authority may make proposals to the trustees for the user of the school site and buildings for undenominational educational purposes of a stated or indicated character and at stated or indicated times.

6. The trustees shall with all reasonable speed take any such proposals into consideration and intimate to the local education authority either that the trustees assent thereto (in which case as well as in that of a subsequent agreement the said proposals shall be carried into effect) or that they dissent therefrom either wholly or partially and in the latter case to what extent and shall in case of dissent state briefly the reason or reasons therefor. If after notice of any such dissent the trustees and the local education authority shall be unable or unwilling to come to an agreement in the matter then and in any such case the local education authority shall be entitled to apply to the High Court of Justice for the determination of the difference either in the above mentioned action if still subsisting or revived for the purpose or by independent originating summons. Provided always that any such applications in the above mentioned action shall be made only with the assent of His Majesty's Attorney-General and any such application by way of originating summons shall only be made subject to compliance with the restrictions imposed by section 17 of the Charitable Trusts Act, 1853.

7 .Any agreement between the trustees and the local education authority as to the user of the school site and buildings for undenominational educational purposes or any assent by the trustees to such user shall be temporary and provisional only and without prejudice to the primary or overriding right of user thereof for Church educational purposes at any future time and under any material alteration of circumstances or upon the occurrence of fresh opportunities for such last mentioned user.

8. If the school site and buildings or any part thereof shall be used for undenominational educational purposes as aforesaid a proper payment shall be made by the local education authority for all wear and tear caused by or arising out of such use and for a due proportion of the expenses of insurance and repair and

C. A. 1912

ATTORNEY-GENERAL v. PRICE.

of the general maintenance and upkeep of the school site and buildings and any difference as to the amount of such payment shall be determined under the Arbitration Act, 1889, by a single arbitrator.

9. Nothing in this scheme contained or to be done hereunder shall in any way prejudice or affect any right or power of the said trustees under the said deed poll or statute or otherwise to make any arrangement as to the reopening and subsequent user of the school site and buildings as a public elementary school upon any terms otherwise available for them.

Upon a summons to settle the scheme Swinfen Eady J., after hearing the Attorney-General and the trustees, approved it in the above-mentioned form subject to the following amendments, that is to say :—Clause 1 remained unaltered. The first part of clause 2 was to stand, the latter part being amended so as to read as follows: "and secondarily and subject always and without prejudice to the aforesaid primary and overriding user the school site and buildings may be used or let on weekdays for such purposes other than those hereinbefore specified (but so as not to interfere with the educational character of the trust) as the trustees shall determine." Clauses 3 to 8 inclusive were struck out and the following two clauses substituted therefor :—

3. If the school site and buildings or any part thereof shall be let for any purposes not being among Church educational purposes as hereinbefore defined a proper payment shall be charged sufficient at least to defray the expenses incidental to such letting in each case.

4. Any payment received from any such letting as aforesaid shall be applied by the trustees in making good all wear and tear caused by or arising out of such letting and for the expenses of insurance and repair and of the general maintenance and upkeep of the school site and buildings and subject thereto in aid of the Church educational purposes aforesaid.

Clause 9 became clause 5 and was unaltered except that for the words "a public elementary school" the words "an elementary school" were substituted.

In the course of his judgment approving the scheme in its amended form Swinfen Eady J. said that he was satisfied that

the primary trust and the primary objects of the foundation would be the better carried out by enabling the trustees to let the building for such period as it might not be wanted strictly for Church educational purposes, receiving a rent for it and applying the money so received to those purposes. It would diminish the risk of reverter and enable the trustees more faithfully to execute the primary trusts comprised in the deed. In his opinion the scheme as thus altered much more closely adhered to and followed the terms of the trust than it did in its original form as proposed by the Attorney-General.

Against this decision the Attorney-General appealed. The notice of appeal asked that the order of Swinfen Eady J. and the scheme comprised in the schedule thereto might be discharged or varied and that in lieu thereof a scheme might be approved in accordance with the form proposed by the Attorney-General or in such other form as to give effect as regards the premises in question to a general charitable intention in favour of education so long as the provision thereon of public elementary education in connection with the religious teaching of the Church of England remained impracticable.

Sargant (*Sir Rufus Isaacs, A.-G.*, with him), for the appellant. The original scheme as proposed by the Attorney-General provided that the school should be used primarily for Church of England educational purposes, and secondarily, so far as they might not be used for Church educational purposes, for educational purposes of a secular and strictly undenominational character. The scheme should be restored to that form. Upon construction of the deed there is a general underlying educational intention on the part of the donor to which the Court will give effect, the particular intention that the educational purposes should be in connection with the Church of England having failed: *Attorney-General* v. *Boultbee* (1); *Mills* v. *Farmer* (2); *Glasgow College* v. *Attorney-General* (3); *Attorney-General* v. *Stewart* (4); *In re Campden Charities*. (5)

(1) (1794) 2 Ves. Jun. 380.
(2) (1815) 19 Ves. 483.
(3) (1848) 1 H. L. C. 800.
(4) (1872) L. R. 14 Eq. 17.
(5) (1881) 18 Ch. D. 310.

C. A. 1912 — ATTORNEY GENERAL v. PRICE.

The scheme as amended by the judge does not give effect to the general underlying intention to subserve education. The danger of a reverter under s. 2 of the Schools Sites Act, 1841, will be increased by not giving effect to the general educational intention: *Attorney-General* v. *Shadwell* (1); *Attorney-General* v. *Guise*. (2) The application cy-près is merely carrying out the intention of the donor, and the purposes of the trust have not failed as against the heir-at-law. The circumstances of this case are much like those in *Attorney-General* v. *Edalji*. (3) The Court is not tied down to the narrow terms of the particular mode in which the general intention is to be carried out. The general educational character of the trust should have effect given to it.

Levett, K.C., and *P. F. S. Stokes*, for the trustees. This is an attempt by the local education authority to obtain the use of a Church school for undenominational education without paying for it. The appeal is opposed on four grounds:

1. It was the intention of the donor as shewn by the deed to create a trust for religious education of a particular denomination. There is no general intention to promote education apart from education on Church of England principles. By s. 2 of the Schools Sites Act, 1841, under which the site was conveyed, it must be used "for the purpose of religious and useful knowledge"—not useful knowledge with religion thrown in. The land was given under powers which only authorized the donor to give it for religious purposes. It was in fact given for the purpose of carrying on a national school, i.e., a school under the charter of the National Society, and by the terms of that charter the school must be used for education in accordance with the principles of the Established Church.

2. The scheme proposed by the Attorney-General is not in accordance with the order made by Swinfen Eady J. on March 19, 1908. As modified by the learned judge it is in accord with that order, which cannot now be appealed from. The Attorney-General's scheme provides that the local education authority shall have the right to oust the trustees from the control of the school.

(1) [1910] 1 Ch. 92.
(2) (1692) 2 Vern. 266.
(3) (1907) 97 L. T. 292; [1907] W. N. 174.

3. The scheme as modified by Swinfen Eady J. is much nearer the intention of the donor than that of the Attorney-General: *Attorney-General* v. *Earl of Mansfield* (1); *Ironmongers' Company* v. *Attorney-General* (2); *Attorney-General* v. *Governors of Sherborne Grammar School.* (3)

4. If the Attorney-General's scheme is approved there is very little doubt that the provision for reverter under s. 2 of the Act will come into operation.

Sargant in reply. Under the Schools Sites Act, 1841, a site may be given for a school apart from religious education. There are three purposes for which a site may be given, and the provision that the education shall be in religious and useful knowledge applies only to one of these.

Cur. adv. vult.

Feb. 28. COZENS-HARDY M.R. This appeal raises an important question as to the nature of a scheme to be framed for what may, in popular language, be called an abandoned national school. Our decision will affect a large number of similar schools.

By a deed dated December 31, 1867, the Baroness Windsor and her trustees under the authority of the Schools Sites Act, 1841, conveyed a plot of 1452 square yards in the parish of Eglwysilan, in the county of Glamorgan, with a reservation and exception of minerals, to the minister and chapel wardens of the chapelry district of Caerphilly and their successors for the purposes of the said Act "Upon trust to permit the said premises and all buildings thereon erected or to be erected to be for ever hereafter appropriated and used as and for a school for the education of children and adults or children only of the labouring, manufacturing and other poorer classes in the district of Caerphilly, and for no other purpose." This language is clear, and in my opinion it states the general purpose of the charity. Then follow a number of declarations and clauses which state with equal clearness the special form in which the general purpose was to be effectuated. The school was to be in

(1) (1826) 2 Russ. 501, 514. (2) (1844) 10 Cl. & F. 908, 927.
(3) (1854) 18 Beav. 256, 280.

C. A. 1912 — ATTORNEY-GENERAL v. PRICE. — Cozens-Hardy M.R.

union with and conducted according to the principles of the National Society for Promoting the Education of the Poor in the Principles of the Established Church. The principal officiating minister for the time being was to have the superintendence of the religious and moral instruction of all the scholars attending the school and might use the premises for the purposes of a Sunday school under his exclusive control and management. In other respects the management was to be vested in a committee consisting of the clergyman and four other persons, all of whom must be members of the Church of England. No person could be master or mistress who should not be a member of the Church of England. It is not necessary to consider these declarations and clauses in detail. It is sufficient to say that they contemplate and provide for a sectarian elementary school of the most stringent type. It appears from a covenant at the end of the deed that it was in contemplation that money would be obtained from the Treasury towards the cost of the erection of the schoolhouse, and I assume that this was done. However that may be, school buildings were erected on the land shortly after 1867, and the school was carried on as a public elementary school until 1905, when it was closed by reason of the inability of the trustees to satisfy the requirements of the proper authorities as to repairs and improvements, and it has not since been reopened as a public elementary school. There has, however, been a Sunday school under the control and management of the parish clergyman, and mothers' meetings and bands of hope and other similar societies made occasional use of the school buildings.

On November 27, 1906, this action was commenced by the Attorney-General at the relation of the Glamorgan County Council against the trustees asking (inter alia) for a scheme. At the trial of the action on March 19, 1908, Swinfen Eady J. ordered that a scheme for the regulation and management of Baroness Windsor's charity established by the deed poll of December 31, 1867, having regard to the directions contained in the deed poll be settled by the judge. Nothing was to be done for six months in order to enable the trustees to have the school provided as a new public elementary school, but nothing effectual

was done within that period. I should add that the order directing a scheme is in common form, the words "having regard to the directions contained in the said deed poll" only expressing the undoubted truth that the Court is not wholly at large in framing a scheme without reference to the original terms of the foundation. The Attorney-General in his official character, and not as in any way representing the relators, was directed to propose a scheme. His scheme was (1.) temporary, and to take effect only during such period as the premises should not be used for the purposes of a public elementary school; (2.) by way of addition or supplement to the trusts of the deed poll, and not by way of revocation or substitution. It provided that the premises (in addition to the use thereof on Sundays for the purposes of a Sunday school) should be used on weekdays as follows: "First and primarily, and in priority to all other uses, the school site and buildings shall be used on weekdays for such educational purposes in connection with the principles of the Established Church (hereinafter called Church educational purposes) as may be reasonably determined by the minister and churchwardens of the chapelry district of Caerphilly in the county of Glamorgan for the time being (hereinafter called the trustees) having regard to the provisions and trusts of the said deed poll, and, secondarily, and subject always, and without prejudice, to the aforesaid primary and overriding user the school site and buildings shall be used on weekdays for such educational purposes not connected with the Established Church or any creed or denomination (hereinafter called undenominational educational purposes) as may be ascertained and allowed as hereinafter provided."

Then follow a number of provisions for enabling the undenominational purposes to be carried into effect by the local education authority and for settling disputes between the trustees and the local education authority.

The trustees strongly object to this scheme so far as undenominational educational purposes are concerned and insist upon keeping the entire control in their own hands and having a right to let the premises either at a nominal rent or at a commercial rent and to apply the net receipts in aid of Church educational purposes. Swinfen Eady J. has accepted the view

C. A. 1912

ATTORNEY-GENERAL v. PRICE.

Cozens-Hardy M.R.

of the trustees and has modified the scheme accordingly. From this decision the Attorney-General appeals.

Now there are several points which require consideration. In the first place, the special purpose prescribed in the deed of 1867 was unquestionably an elementary day school of the National Society type for the instruction of children and adults, or children only, of the poorer classes during the week. The Sunday school was optional only, according to the desire, not of the trustees, but of the clergyman. There is no reference to Church purposes apart from such day school and Sunday school. In the second place, this special purpose failed in 1905. The order for a scheme proceeds upon that footing. It has not been, and cannot be, contended that the trustees are, or have any reasonable prospect of being, in a position to fulfil this special purpose. In the third place, the property having been acquired under the Schools Sites Act, 1841, it would be contrary to the provisions of the Act to allow it to be let at a rent to be applied for Church purposes generally, or in aid (say) of another national school in the neighbourhood. I may add, as the point was argued by Mr. Levett, that I feel no doubt that the Act is not limited to education which is both religious and useful. It extends to purely secular education. In the fourth place, whatever may be the rights of some person not before the Court under the reverter clause in the Act (as to which it would be wrong for me to express any opinion), the trustees so long as they are in possession under the deed are bound by the trusts declared in the deed as varied by any scheme made by the Court. The danger of reverter will be lessened by the existence of a day school for elementary education. In the fifth place, the trustees have neither the will nor, for financial reasons, the power to use the premises effectually for secular or non-sectarian education.

Now in these circumstances I think the case falls within the well-established principle that where you find a general charitable intention coupled with a particular mode, which has failed, of giving effect to that intention, the Court gives effect to the general intention in some other and more practicable mode. It seems to me that the Attorney-General is substantially right, though in form I think his scheme should be modified. The

word "undenominational" has the effect of a red rag upon some people, and it is better not to use it. I prefer to adopt as nearly as may be the general language of the deed. So that without tying myself to precise words, and of course without prejudice to the special Church purposes, the latter part of clause 2 would run somewhat as follows: "as and for a school for the education (whether purely secular or not) of children and adults or children only of the labouring, manufacturing and other poorer classes in the district and for no other purpose, such school to be under the management and control of the local education authority." It seems obvious that the local education authority is the only body having both the will and the power to utilize the school for educational purposes. If reasonable good feeling and common sense could be confidently relied upon, there would be no difficulty in arranging matters. But unhappily the relations between the Glamorgan County Council and the trustees are strained, and the trustees, with or without reason, do not feel that they will have fair and sympathetic treatment at the hands of the county council. This being so, I think the latter part of the scheme should be so modified as to lessen the risk of friction. It is not for us to work out these details. I may, however, suggest that if the relators would state that they desire to use the buildings during certain defined hours only for (say) some branch of technical education, and not for general elementary education of school board type, the trustees would probably feel less objection. On the other hand the trustees must define what, if any, hours they want to reserve during weekdays. The scheme might provide for this delimitation in the first instance, leaving either the trustees or the local education authority to apply to the Court in case of need. All this is for the judge.

In my opinion the order under appeal must be discharged, and it must be referred back to the judge to settle a scheme having regard to what I have said. The order might be prefaced by the following declaration: "The Court being of opinion that upon failure of and subject to the special trusts for carrying on a national school in connection with the Church of England the premises ought to be appropriated and used generally as and for a school for the education of children and adults or children only

C. A. 1912

ATTORNEY-GENERAL v. PRICE.

of the labouring manufacturing or other poorer classes in the district of Caerphilly and for no other purpose."

FLETCHER MOULTON L.J. By deed poll dated December 31, 1867, Baroness Windsor conveyed a piece of land in the district of Caerphilly to trustees under the powers and for the purposes of s. 2 of the Schools Sites Act, 1841. The precise language of the deed is important. The lands are to be held for the purposes of the Act upon trust "to permit the said premises and all buildings thereon erected to be for ever hereafter appropriated and used as and for a school for the education of children and adults or children only of the labouring, manufacturing and other poorer classes in the district of Caerphilly and for no other purpose." It goes on to say that such school shall at all times be open to the inspection of the inspectors of schools for the time being appointed in conformity with the Order in Council bearing date August 10, 1840, and shall always be in union with and conducted according to the purposes and in furtherance of the ends and designs of the National Society for Promoting the Education of the Poor in the Principles of the Established Church throughout England and Wales. The Order in Council herein referred to is the Order which provides for the inspection of schools in connection with that society. It is therefore abundantly clear that the intention of the donor of the site was that the school for which it was to be used should be one in which the education was to be under the control and direction of the National Society, and that therefore the education given thereat should be in accordance with the principles of the Established Church. This intention on the part of the donor is made evident also by numerous other provisions which are to be found in the deed of gift, such as the provision that the master or mistress of the school must be a member of the Church of England, that all the members of the committee of management must be members of the same Church, and so on. I do not think it of any importance to examine these provisions in detail, because the general intention that the education should be denominational in connection with the Church of England is obvious from what I have already referred to.

A schoolhouse was erected on the land and paid for in part

out of a parliamentary grant, and the school was carried on as a public elementary school not provided by the local education authority until the end of 1905. The managers then found themselves unable to provide for the expenses which fell upon them and were not payable by the local education authority, and accordingly the school was closed at the end of 1905. The building was still used in conformity with the provisions of the deed of gift for a Sunday school and was also put to certain other subsidiary uses during the week, such as a Church Institute, mothers' meetings, &c. But it ceased to be a public elementary school on July 31, 1905, and after Christmas, 1905, the school was not reopened.

In November, 1906, after the school had been closed for nearly a year, the Attorney-General at the relation of the education authority of the district, namely, the Glamorgan County Council, commenced an action (authorized by an Order of the Board of Education) against the trustees of the charity for administration of the charitable trusts affecting the land in question. The object of the said action was substantially to obtain a scheme for the regulation and management of the charity. It came on for hearing before Swinfen Eady J. on March 19, 1908. In his judgment the learned judge decided that a scheme should be framed. The order made by him was intentionally expressed in general terms, the operative words being "Let a scheme for the regulation and management of the Baroness Windsor's charity established by the deed of the 31st December, 1867, in the pleadings mentioned, having regard to the directions in the said deed contained, be settled by the judge." A certain delay was accorded to the defendants to enable them to make an application to provide a new public elementary school, but no further reference need be made to this inasmuch as nothing came of it. In obedience to such order the Attorney-General framed a scheme. In so acting he was in no wise representing the relators, but was acting independently in his character as Attorney-General. The defendants objected to this scheme and submitted to the judge on the hearing of the summons to settle the scheme a revised form in favour of which he has decided, and from that decision the present appeal is brought.

C. A. 1912 ATTORNEY-GENERAL v. PRICE. Fletcher Moulton L.J.

The points of difference do not relate to the details of the scheme. They relate to fundamental questions of principle. It is expressly provided in the scheme that it shall operate only during such time as the school site and buildings shall not be used for the purposes of a public elementary school, and that it shall also operate by way only of addition or supplement to the trusts and provisions of the deed poll, and not by way of general revocation or substitution, and that accordingly all such trusts and provisions shall be unaffected excepting so far as they are expressly or impliedly added to or supplemented by the scheme. The scheme goes on to provide that in addition to the use on Sundays for the purposes of a Sunday school the school site and buildings shall be used on weekdays primarily and in priority to all other uses for such educational purposes in connection with the principles of the Established Church as may reasonably be determined by the trustees having regard to the provisions and trusts of the said deed poll. So far the parties are agreed. But this is little, if anything, more than a provision that the trusts of the deed poll shall be carried out if possible, and I only refer to it in order to shew that there is nothing in the scheme put forward by the Attorney-General which is intended to interfere with the provisions of the trust so long as they are capable of being carried out. The dispute arises as to what is to be done in case it is impossible to carry out the trusts in entire conformity with the provisions of the deed, which is the case that has arisen.

The scheme as settled by the Attorney-General carries out the view that the cy-près doctrine must be applied, and that it is possible in the present case to find an underlying intention to devote the land to the purposes of the Act which ought to be carried out, although the special way in which the deed provides and intends it to be carried out is no longer practicable. Accordingly the scheme provides as follows: "Secondarily and subject always and without prejudice to the aforesaid primary and overriding user the school site and buildings shall be used on weekdays for such educational purposes not connected with the Established Church or any creed or denomination (hereinafter called undenominational education purposes) as may be ascertained

and allowed as hereinafter provided." It then goes on to make provision as to the user for undenominational education and for the proper payment by the local education authority for all wear and tear caused thereby. The propriety or sufficiency of these detail arrangements is not in controversy before us.

The contention of the defendants is that there is no such underlying intention, but that the sole purpose of the trust is education in association with the religious teaching according to the tenets of the Established Church. They therefore contend that as it is admittedly impracticable to carry on the school on such lines the proper thing is to let the premises for a commercial rent and apply the money so obtained to Church educational purposes. They accordingly propose to strike out the above provisions, and to insert after the words "overriding user" "the school site and buildings may be used or let on weekdays for such purposes other than those hereinbefore specified (and so as not to interfere with the educational character of the trust) as the trustees shall determine." And later on they provide that the payments received for such letting should be applied first to the maintenance and upkeep, &c., of the school site and buildings "and subject thereto in aid of the Church educational purposes aforesaid."

It is between these two conflicting views that the Court has to decide, and I have no hesitation in coming to the conclusion that the view represented by the scheme as settled by the Attorney-General is the correct one. I think that the general underlying intention that the site should be used for educational purposes is to be gathered from the form of the deed poll itself, where we find that the trust is "for a school for the education of children and adults, or children only, of the labouring, manufacturing and other poorer classes in the district of Caerphilly and for no other purpose." The close and intimate association with the National Society and the other provisions which are intended to secure that the education given shall be in connection with the Church of England seem to me to be intended to express the features which the donor desires in such education. If it is possible to preserve those features, unquestionably the trust requires that it should be done. The application of the cy-près doctrine does not negative this. It admits it, and provides that

C. A. 1912 ATTORNEY-GENERAL v. PRICE. Fletcher Moulton L.J.

where it is possible to carry out in its entirety the desire of the donor it shall be done, but it recognizes that where that is impossible the true conclusion is not that the trust should fail, but that the general underlying intention should be carried out as best it can, and this is the object and effect of the Attorney-General's scheme.

Holding that this general underlying intention is to be found in the deed, it is clear that in accordance with the practice of the Court one ought to secure that it shall be carried out by the scheme in case the full objects of the deed should be impracticable, but in addition I am of opinion that the scheme proposed by the defendants would cause the school site and buildings to be used in a way not falling within the purpose in the Act mentioned. Sect. 2 of the Schools Sites Act, 1841, does not in my opinion permit persons to dedicate plots of land for educational purposes in the sense that the rental value of such land is to be applied to educational purposes, and what cannot be done directly cannot be done indirectly through the failure of the original trusts. The section empowers persons to convey any quantity not exceeding an acre "as a site for a school for the education of poor persons, or for the residence of the schoolmaster or schoolmistress, or otherwise for the purposes of the education of such poor persons in religious and useful knowledge." Taken in connection with the title of the Act I have no doubt that this implies that the land is to be used as a site for schools (whether for religious or secular education) or their appurtenances, and not as a means of revenue for educational purposes. I do not mean by this that where it in no way interferes with a proper user of the land as a site it may not be let at times when it cannot be used for a school, &c., or that payment may not be received therefor and applied to the maintenance of the school. That is not a point which arises here, but I am satisfied that the abandonment of the use of the land as a site on which the educational purposes of the trust are carried out would amount to the land "ceasing to be used for the purposes" mentioned in the Act, and that the statutory reverter would operate.

For these reasons I am of opinion that this appeal must be allowed. The scheme as altered by the defendants, and as approved

by the judge, is in my opinion inadmissible, and the scheme as propounded by the Attorney-General carries out that "general charitable intention in favour of education" which I think is to be found in the deed. With respect to the details of that scheme I feel that so soon as the principle is decided it would be well that they should be determined after an opportunity has been given to the parties to consider them in the light of that decision, but if this is impracticable I agree with the criticisms upon those details and the amendments thereof which are contained in the judgment of the Master of the Rolls.

BUCKLEY L.J. This is a case of the first importance. The decision may affect the future of any one of the many thousand denominational schools throughout the United Kingdom. The religion which this charitable donor endowed was that of the Established Church of England and Wales, but had it been that of the Church of Rome, or of any of the Nonconformist churches, or of any other denominational faith which would be included under the word "religion," the legal principles applicable would be exactly the same. The question is whether in a charitable endowment for education according to the principles of the Established Church a scheme shall be approved by which undenominational education shall be included among the benefits of the charity with the result that under some circumstances the local education authority shall be entitled as of right to the use and occupation of the site and buildings forming the endowment contrary to the wishes of the minister and churchwardens who are the trustees of the charity and without payment of rent. More briefly the question is whether to a charitable endowment for education coupled with a particular denominational religion education not coupled with religion or coupled with religion not of that denomination is cy-près.

The Schools Sites Act, 1841, was an Act which enabled a limited owner to convey the fee for charitable purposes of which the Act describes two and then adds "or otherwise for the purposes of the education of such poor persons in religious and useful knowledge." Those words "religious and useful knowledge" in that context govern in my opinion the whole purposes

C. A. 1912 ATTORNEY-GENERAL v. PRICE. Buckley L.J.

of the Act. The purposes previously named were the conveyance of lands as a site for a school for the education of poor persons or for the residence of the schoolmaster or schoolmistress, and then follow the words "or otherwise" &c. which I have quoted. The school and the master are in my opinion under this Act to be a school and a master for the education of poor persons in religious and useful knowledge. By thus linking "religious" and "useful" together the Act indicates, I think, that the religion to which the donor devotes his gift is an essential feature of the endowment. For the purposes of this case this is important but not vital. "Undenominational" and "irreligious" are not convertible terms. Religious teaching may be coupled with education without introducing denominational principles. But it is another question, where the donor has endowed education coupled with the principles of a particular denomination, whether undenominational education ought to be included in a scheme. The second point to which I call attention in the Act is that the purposes of the Act are not confined to the education of children. The class are to be poor persons, they may be either children or adults. This is a point which has to some extent been overlooked in this case and is in fact ignored to a large extent in each of the two schemes proposed.

The charity was endowed by a deed of December 31, 1867. The conveyance is expressed to be made under the authority of the Act of 1841 and another Act of the 8th Victoria to which it is not necessary to refer. The conveyance is to the minister and churchwardens for the purposes of the Act upon trust to permit the premises for ever to be used for a school for the education of children and adults or children only of the labouring, manufacturing, and other poorer classes in the district of Caerphilly. There follows a declaration that the school shall be at all times open to the inspection of the inspector of schools appointed under an Order in Council there referred to, under which the inspectors were to be persons suggested by the Archbishops of Canterbury and York, each with regard to his own province, and the school was always to be in union with and conducted according to the principles and in furtherance of the ends and designs

of the National Society for Promoting the Education of the Poor in the Principles of the Established Church throughout England and Wales. The deed goes on to provide that, subject to and in conformity with that declaration, the school shall be controlled and managed as therein provided. There follow provisions that the minister of the district shall have the superintendence of the religious and moral instruction of the scholars, that there shall be a governing committee composed of the minister, who shall be chairman, his curates, if he shall appoint them, the chapel warden, and four members of the Church of England, and that the chapel warden and such four persons shall not be entitled to serve until they have made a solemn declaration that they are members of that Church, and that the master or mistress shall be members of the Church of England, and that disputes as to the prayers to be used or religious instruction to be given shall be referred to the bishop, and that any other differences shall be referred to an inspector of schools, a beneficed clergyman, and a justice of the peace who shall be a member of the Church of England, and that there shall be a ladies' committee consisting of members of the Church of England. Upon the construction of this deed it has been argued before us by the Attorney-General that the primary charitable intent is education, and that education according to the principles of the Established Church is a secondary intent. In my opinion this is not the true construction of the deed. The premises are to be used for a school which the deed declares is to be a school of a certain kind, and it is subject to and in conformity with that declaration that the school is to be controlled and managed as mentioned by the deed.

The action was tried before Swinfen Eady J. on March 19, 1908. The learned judge held, rightly as I think, and at any rate by a decision which was not appealed, that the frame of the deed shews that the school is to be a Church of England school and one to be conducted in accordance with the principles of the National Society. He further pointed out, as is the fact, that the trusts of the deed are not for the education of children only, but for the education of children and adults or children only, and after expressing approval of some purposes to which the buildings had

C. A. 1912

ATTORNEY-GENERAL v. PRICE.

Buckley L.J.

been put which were not purposes of the education of children, for instance, mothers' meetings, and Girls' Friendly Society, where cutting out garments is taught and instruction given in sewing, a Church Lads' Brigade, a glee club, a band of hope, and a Church Institute, some of which, as he pointed out, would fall within education in the wide sense used in this deed, he went on to say that the charity was a Church of England charity and that the main object was to promote instruction and education in the principles of the Established Church, and that in any scheme full regard would have to be paid to that provision. He then directed the settlement of a scheme having regard to the directions in the deed adhering as closely as possible to the objects defined by the donor. That was, I think, a decision that the scheme directed by the order was to be a scheme having regard to the directions of the deed as the judge had construed the deed. The scheme ought to be settled upon the principles indicated in that judgment, being as it is a judgment binding as between these parties.

The essential difference between the scheme approved by the judge and that proposed by the Attorney-General, and which the Attorney-General asks us to approve, lies in the introduction of undenominational education as a benefit to be enjoyed under the charity with provisions under which the local education authority would be entitled to receive from time to time from the trustees of the school and at least once a year a statement of the manner and extent to which the school was being used on weekdays for Church educational purposes, with consequential provisions under which the local education authority might call in question the user of the school by the trustees and might under circumstances become entitled to have the user and occupation of the premises for undenominational educational purposes as of right and without payment of rent. In my opinion a scheme in this form ought not to be approved whether upon the facts so far as any facts are established or upon a consideration of what will be cy-près to the objects of the charity or most beneficial in the working of the charity.

No evidence has been adduced to guide the Court in formulating the scheme. The fact is that as regards what is generally

called an elementary school, that is a school for the education of children of school age within the Education Acts in the elements of instruction, it must be taken to have been established in 1908 that the charity is no longer operative. But this by no means exhausts the charitable purposes of the donor. The duty of the Court under the circumstances is to see first whether it is established that those wider purposes of the donor, namely, the education of children and adults, are shewn to have become impossible, and if so, then to settle a scheme adhering as closely as possible to the purposes selected by the donor. I am not sure that at the original hearing sufficient attention was drawn to the fact that the charity is not limited to an elementary school, and indeed the same may be said, as I shall point out, as regards each of the schemes now under review. But for the purposes of this judgment I think I must take it that it was established in 1908 when a scheme was directed that the purposes indicated by the donor had so failed as that it became necessary to supplement them. However this may be, the whole and not part only of the original purposes must certainly now be preserved by the scheme, and I shall indicate an alteration which I think ought to be made in the language of the scheme with this object. As between the two schemes before us I have to consider which of them adheres most closely to the purposes of the donor. In my opinion that which the learned judge has approved. Nay, more, I think that the scheme put forward by the Attorney-General is contrary to and in derogation of those purposes. In a charity for the education of children and adults there are many purposes other than those of an elementary school for which this endowment might be used. Some of those purposes were indicated by the learned judge in 1908.

Further, the encouragement of a sounder knowledge of the laws which govern health, sanitation, and domestic economy is beginning to be recognized as one of the most important developments of the education of the adult population. Queen Mary's Hostel is being established in London with this object in view. In education of this kind this charity might prove useful in Caerphilly, and there is certainly no evidence that it would not. All such education as this will fall under the provisions of

C. A. 1912

ATTORNEY-GENERAL v. PRICE.

Buckley L.J.

the deed without any scheme to enlarge the purposes expressed in the deed. The first proper enlargement of those purposes I think is to provide that in case the trustees have not themselves the funds to carry out their purposes they may demise or grant the user and occupation of the premises either at a suitable rent or upon such terms as they think right and thus put the premises into the hands of persons who have or can obtain the funds necessary to give education such as the donor intended and in connection with the principles of the Established Church. Where the trustees have not themselves the funds to carry out the donor's objects the nearest approximation is to allow them to assure the user of the premises to those who have and who will undertake to carry out those purposes. The case is one where not the purposes but the funds to work them are wanting. By such letting the trustees would or might come into some funds. Under the scheme (whichever form is adopted) the trustees are to have the user of the school on Sundays for religious education. The funds arising from the letting of the buildings, if they should be let at a rent, could properly be used for the purposes of the trust in carrying out more fully and advantageously this religious education which is one of the principal objects of the charity. The scheme ought therefore, in my opinion, to allow of demising or granting the user and occupation of the premises for educational purposes, and they should be educational purposes in the wide sense in which education is used in the deed.

Further, and in addition to this, the trustees may, I think, if circumstances so require, be allowed to use or let for purposes not strictly educational but so as not to interfere with the educational character of the trust. It will be noticed that in that which I propose as regards power in the trustees to let I have not suggested any words which would prevent them from letting if they so thought fit to the local education authority. I notice that Swinfen Eady J. in his judgment under appeal points out that the scheme as he settled it will not prevent the trustees, if they so determine and the parties so arrange, letting to the local education committee. I agree that this may be left open as a possible, and it may be a useful, course to take.

It does not follow that education in a school in which denominational religious teaching is not given will fall short of satisfying the language of the Act in the phrase "religious and useful knowledge." Undenominational teaching may nevertheless be religious. But it ought, I think, to be left to the trustees of the charity to make such arrangements in this respect as to them seem right. The point is most shortly expressed by saying that undenominational education is not within the purposes of the deed, but may under circumstances become cy-près to those purposes. It is not established by any evidence adduced in this case that it is one which ought by the Court to be recognized as cy-près under the present circumstances, in such sense as that the trustees ought to be compelled to introduce it whether they think it right so to do or not.

There are two other considerations which weigh with me in the judgment which I have formed. The one is that under the scheme propounded by the Attorney-General friction must, I think, necessarily be engendered between the trustees and the local education authority, and that is a matter which I have every disposition to avoid. The minister and churchwardens and the charitable donor cannot in human nature fail to resent the appropriation of a Church endowment to a form of education which they regard as harmful. The other is that, having regard to the provisions of the Act as to reverter, it is most necessary in the interests of the charity to take such course as that the parties who would be entitled under the reverter clause should not seek to prefer a claim that the purposes of the charity have come to an end.

As regards the language of the scheme itself as approved by the judge I notice that in the first paragraph the scheme is to operate during such period only as the premises shall not be used for the purposes of "an elementary school." The words "an elementary school" convey the meaning of a school for the education of children in the elements of learning (see ss. 3 and 5 of the Elementary Education Act, 1870). This is not an accurate or exhaustive statement of the purposes expressed in the deed. There should be substituted for the words "an elementary school" the words

C A. 1912

ATTORNEY-GENERAL v. PRICE.

Buckley L.J.

of the deed, namely, "a school for the education of children and adults, or children only, of the labouring, manufacturing and other poorer classes in the district of Caerphilly in accordance with the provisions of the said deed poll." Further, in the second clause there should, I think, be introduced words (1.) authorizing letting, and (2.) attaching to the words "educational purposes" such a meaning as to extend them to educational purposes other than the purposes of a school. The deed limits the purposes to "a school." Educational purposes other than "a school" should be allowed as cy-près. By this means two enlargements will be introduced cy-près, namely, first, an authority to let, and, secondly, an authority to use for education, but not in a school. The earlier words of the second clause would then read thus: "First and primarily, and in priority to all other uses, the school site and buildings shall be used or let on weekdays for such educational purposes (other than the purposes of a school) in connection with the principles," &c. The original purposes as expressed in the deed having been preserved by clause 1, two enlarged or additional cy-près purposes will thus be authorized by clause 2, namely, (1.) a power to let, and (2.) an enlargement of the words of the deed which confined the use of the premises to "a school." These are, in the language of the scheme, called primary objects, but are really secondary to the original objects. To make this clear there should be introduced lower down in clause 2 words which shew that that which the scheme calls the primary object is only the first additional authorized object, and not the real primary object. For this purpose the words lower down should run: "and secondarily and subject always and without prejudice to the aforesaid first additional authorized purposes," striking out the words "primary and overriding." Words should be added to express that the word "let" means demise or grant the user and occupation of the premises, whether at a rent or upon any such terms as the trustees think fit, subject as after provided. And in clause 5 for the words "an elementary school" should be substituted the same words as I have substituted in clause 1. Subject to these alterations the scheme which the judge approved should, in my opinion, be

adopted. The result is that in my judgment this appeal should be dismissed.

C. A. 1912

ATTORNEY-GENERAL v. PRICE.

Solicitors: *The Treasury Solicitor; Crawley, Arnold & Co.*

G. A. S.

PARKER J. 1912 *Jan.* 23, 24; *Feb.* 5.

In re HUME. PUBLIC TRUSTEE *v.* MABEY.

[1911 H. 3033.]

Will—Construction—Vesting—Gift to Children at Twenty-three—Remoteness.

In considering whether the trusts of a will are void for perpetuity the Court must first construe the gifts according to the ordinary canons of construction, and then consider whether any part of it, as so construed, offends against the perpetuity rule; and it cannot construe the gift otherwise than according to its natural meaning because, if so construed, it would offend against the rule, though possibly, if the gifts might equally well be construed in two ways, one only of which would offend against the rule, the Court might adopt the other construction.

The creation in trustees of a mere discretionary power to apply the income of an expectant share (given to an individual or class contingently upon the attainment of a certain age) for the maintenance or benefit of the beneficiary, with a direction to accumulate the income not so applied for the benefit of the persons who ultimately attain a vested interest in the share, does not vest the gift originally given contingently.

Legacies were given to trustees, upon trust to pay the income to M., the daughter of the testatrix, for life, and after her death upon trust as to capital and income for all or any of her children who should be living at her death, and, being a son or sons, should attain the age of twenty-three years or survive the survivor of the testatrix and M. for the period of twenty-one years, or, being a daughter or daughters, should attain the age of twenty-three years or marry, and if more than one in equal shares as tenants in common. There were in the will the usual advancement clause and a clause giving the trustees a discretionary power to apply the income of the expectant, contingent, presumptive or vested legacy or share of any grandchild of the testatrix under the trusts of the will for or towards his or her maintenance, education, or benefit. M. survived the testatrix and had two children, both of whom attained the age of twenty-three years:—

Held, that the gifts to the children of M. were contingent interests only, and that the trusts declared in their favour were void for remoteness.

Fox v. *Fox* (1875) L. R. 19 Eq. 286, distinguished.

By her will, dated January 19, 1884, Sarah Maria Hume, widow,

PARKER J. 1912 HUME, *In re.* PUBLIC TRUSTEE *v.* MABEY.

after appointing three persons as executors and trustees thereof, and making various pecuniary and specific bequests, proceeded as follows: "I bequeath to my said trustees the sum of 2000*l.* free from legacy duty, upon trust that they shall invest the same in their names or under their legal control" as therein mentioned, "and shall pay the income of the said sum of 2000*l.* and the investments representing the same to my daughter Maria, the wife of John Mabey, during her life for her separate use," without power of anticipation during any coverture, "and, after the death of the said Maria Mabey, the said trustees shall stand possessed of the said trust premises and the income thereof In trust for all or any of the children or child of the said Maria Mabey who shall be living at her death and being a son or sons shall attain the age of twenty-three years or survive the survivor of me and the said Maria Mabey for the period of twenty-one years or being a daughter or daughters shall attain the age of twenty-three years or marry and if more than one in equal shares as tenants in common." And by her will the testatrix devised and bequeathed her real estate and her residuary personal estate upon trust to sell and convert the same into money, and declared that out of such proceeds the trustees should pay her funeral and testamentary expenses and debts and legacies and the legacy duty on legacies or annuities bequeathed free of duty, and should divide the residue of such moneys into three equal parts and should stand possessed of two of such third parts "upon the same or the like trusts and with and subject to the same or the like powers or provisions for the benefit of my said daughter Maria Mabey and her children as are hereinbefore declared and contained with respect to the legacy of 2000*l.* hereinbefore bequeathed for her and their benefit and the investments and income thereof." Later on the will contained the following words: "I authorize my trustees to raise any part or parts not exceeding in the whole a moiety of the capital of any share portion or legacy to which any minor shall for the time being be actually or presumptively entitled, whether in possession or reversion or expectancy, under this my will or any codicil hereto, and to pay or apply the same for his or her advancement or benefit as my trustees shall think fit." Then followed a

maintenance clause which provided "that my trustees may (after the determination or failure of the prior life interest if any) apply the whole or any part at their discretion of the income of the expectant, contingent, presumptive or vested legacy or share of any grandchild of mine under the trusts hereinbefore contained for or towards his or her maintenance education or benefit during such time as any such grandchildren shall being a male be under the age of twenty-three years or being a female be under that age and a spinster, and may either themselves so apply the same or may pay the same to the parent or guardian or guardians of such child or grandchild as the case may be for the purpose aforesaid without seeing to the application thereof or (in every case in which the absolute vesting is postponed to the attainment of the age of twenty-three years) may pay the same to such grandchild personally if he or she shall have attained the age of twenty-one years and shall during the suspense of absolute vesting of any such legacy or share accumulate the surplus, if any, of the income thereof at compound interest by investing the same and the resulting income thereof in any of the investments hereby authorized, in augmentation and so as to follow the destination of the legacy or share from which the same shall have proceeded, but with power to apply any such accumulation in any subsequent year for or towards the maintenance education or benefit of the grandchild for the time being entitled as aforesaid in the same manner as such accumulations might have been applied had they been income arising from the original trust fund in the then current year."

By a codicil, dated April 5, 1884, the testatrix revoked the said bequest of 2000*l.* in favour of her said daughter Maria Mabey and her children, and in lieu thereof she bequeathed to her said daughter Maria Mabey for her life for her separate use an annuity of 100*l.* free from legacy duty commencing from her death, and to be paid quarterly, and she authorized and directed her executors and trustees to appropriate a sufficient part of her residuary estate for answering by the annual income thereof the last-mentioned annuity, and that as and when the said annuity should cease her trustees should stand possessed of the appropriated fund upon the same trusts for the benefit of the children

PARKER J. 1912 HUME, *In re.* PUBLIC TRUSTEE *v.* MABEY.

or child of her said daughter Maria Mabey as were in the testatrix's will contained with reference to the 2000*l.* thereby bequeathed upon trust for her said daughter and her children. In all other respects the testatrix confirmed her will.

The testatrix died on January 9, 1885, and her will and codicil were duly proved on May 14, 1885.

Maria Mabey survived the testatrix and at the date of the hearing of this case was a widow and had issue one son and one daughter and no more, both of whom had attained the age of twenty-three years.

An originating summons was taken out by the Public Trustee, then the sole trustee of the will and codicil of the testatrix, to have certain questions determined by the Court, including the following: "Whether the gift in the will and codicil contained of the sum directed to be appropriated to answer the annuity of 100*l.* given to the testatrix's daughter Maria Mabey and the gift of two-thirds of the testatrix's residuary estate, after the death of the said Maria Mabey, in trust for all or any of the children or child of the said Maria Mabey who should be living at her death who being a son or sons should attain the age of twenty-three years or survive the survivor of the testatrix and the said Maria Mabey for a period of twenty-one years or being a daughter or daughters should attain the age of twenty-three years or marry and if more than one in equal shares as tenants in common, is void as infringing the rule against perpetuities," and "if so, whether the said appropriated sum falls into residue, and whether the said two-thirds of residue is undisposed of and there is a resulting trust as to so much thereof as represents real estate for the heir-at-law and as to so much thereof as represents personal estate for the statutory next of kin of the testatrix."

The summons was adjourned into Court and heard by Parker J. on January 23 and 24, 1912.

A. Adams, for the plaintiff, stated the facts and the questions involved.

Ingpen, K.C., and *W. Copping*, for the son of Maria Mabey. The gift does not infringe the rule against perpetuities and is valid. The two children of Mrs. Mabey take vested interests:

Fox v. *Fox* (1); *In re Turney.* (2) [They also referred to *Picken* v. *Matthews.* (3)]

Romer, K.C., and *W. H. Cozens-Hardy*, for the daughter of Maria Mabey. We support the same contention. If the words used by the testatrix are not enough to effectuate what was clearly her intention, the Court may, in order to carry out her intention, read one or more words into the will: *In re Redfern* (4); *In re Daniel's Settlement Trusts* (5); *Greenwood* v. *Greenwood* (6); *In re Hunt* (7); Theobald on Wills, 7th ed. p. 756.

Martelli, K.C., and *G. D. Pepys*, for the next of kin. The only question is as to the construction to be placed on the will; and on the true construction of it the gift is void for remoteness. There is no gift of income to the children in the meantime, which is necessary in order that the gift may be vested. The children of Maria Mabey are in effect asking the Court to disregard the ordinary rules of construction so that it may make a gift valid which infringes the rule against perpetuities. Words ought not to be inserted by the Court in order that the rule may be avoided. Due regard must be had to two well-known rules, (1.) that "where there is a gift to a class, any members of which may have to be ascertained beyond the limits of perpetuity—for instance, to the children of a living person who shall attain twenty-five—the whole gift is void" (Theobald on Wills, 7th ed. p. 606), and (2.) that where there is no direction as to vesting, one must "distinguish a gift to a contingent class and a gift to a class upon a contingency" (ibid., p. 582). [They also referred to *Bull* v. *Pritchard* (8); Jarman on Wills, 6th ed. vol. i. p. 364; vol. ii. pp. 1408—1414.]

A. L. Ingpen, for other parties.

Cur. adv. vult.

Feb. 5. PARKER J. The question in this case is whether the trusts declared by the will after the death of the testatrix's daughter, Mrs. Mabey, of the legacy of 2000*l.* given to her for

(1) L. R. 19 Eq. 286.
(2) [1899] 2 Ch. 739.
(3) (1878) 10 Ch. D. 264.
(4) (1877) 6 Ch. D. 133.
(5) (1875) 1 Ch. D. 375.
(6) (1877) 5 Ch. D. 954.
(7) (1890) 62 L. T. 753.
(8) (1826) 1 Russ. 213.

PARKER J. 1912 HUME, *In re.* PUBLIC TRUSTEE *v.* MABEY.

life are void for perpetuity. In considering a question of this sort the proper course is first to construe the gifts according to the ordinary canons of construction, and then to consider whether any part of it as so construed offends against the perpetuity rule. It is not permissible to construe the gift otherwise than according to its natural meaning because if construed according to its natural meaning it would offend against the rule, though possibly if the gift might equally well be construed in two ways, one of which only would offend against the rule, the Court might because of the rule be led to adopt the other construction.

The gift in the present case is to the child or children of Mrs. Mabey living at her death who being a son or sons shall attain the age of twenty-three years or survive the survivor of the testatrix and Mrs. Mabey for the period of twenty-one years or being a daughter or daughters attain the age of twenty-three years or marry, and if more than one as tenants in common. If Mrs. Mabey had predeceased the testatrix, so that no question of perpetuity could arise, I do not think any one would have doubted that on the true construction of the will sons took a vested interest on attaining twenty-three or at the expiration of twenty-one years from the testatrix's death, whichever should first happen, and daughters took a vested interest on attaining twenty-three or previous marriage. I do not think any one would have suggested that daughters took a vested interest at the expiration of twenty-one years from the testatrix's death although under twenty-three and unmarried. The whole frame of the clause appears to negative such a suggestion. I do not think I ought to put a different and somewhat strained construction on the words merely because, Mrs. Mabey having survived the testatrix, the class of children to take might in possible events not be ascertained within lives in being at the testatrix's death and twenty-one years afterwards. It follows, therefore, that in my opinion the trusts of the 2000*l.* after Mrs. Mabey's death are void for perpetuity, unless, having regard to other parts of the will, I can construe the interests taken by the children as vested interests subject to be divested in certain events, and not as contingent interests.

It was urged in argument, and indeed is well settled, that if there be a gift to an individual or a class upon the attainment of a certain age, such gift is prima facie contingent on the specified age being attained, but that where there is also a gift to the same individual or class of the income to accrue before the specified age be attained, the gift of the corpus, though in form contingent, will be construed as conferring a vested interest. This is not unreasonable, for the donor evidently contemplates that the beneficiary will take the income till the specified age be attained and the corpus when such age is attained; in other words, that he will ultimately take the whole subject-matter of the gift, both principal and income. Further, the gift of the intermediate income may consist in a direction to apply such income for the maintenance or benefit of the individual or the members of the class, provided in the latter case that each beneficiary is to have the income of his or her expectant share and that the testator does not create a common fund for the common maintenance of the class. It is possible also that a direction to apply the intermediate income or such part thereof as the trustees may think proper for the maintenance or benefit of the beneficiary will have the same effect: *Fox* v. *Fox.*(1) I cannot, however, find any case in which the creation in the trustees of a mere discretionary power to apply the income of an expectant share for the maintenance or benefit of the beneficiary, with a direction to accumulate the income not so applied for the benefit of the persons who ultimately attain a vested interest in the share in question, has been held to vest a gift originally given upon attaining a specified age. I do not see how it can in principle have this effect, for the donor is evidently contemplating not that the beneficiary will in some form or other enjoy the intermediate income, but that he will not so enjoy it unless the discretionary power be exercised. Further, I have come to the conclusion that there is a broad distinction, for the purposes I am considering, between a gift to a class upon attaining a specified age and a gift to such members of a class as attain a specified age. In the latter case clearly no one is intended to take unless he attains the age in question. It is no longer a question of construing as vested a gift which is only prima facie

(1) L. R. 19 Eq. 286.

PARKER J. 1912 HUME, *In re.* PUBLIC TRUSTEE *v.* MABEY.

contingent, but of adding to the class of beneficiaries. If I held that the interests in the present case were vested interests, I should not only be going far beyond anything for which I can find justification in the authorities, but should be throwing doubt upon the accepted principles with reference to which many settlements must have been framed.

In my opinion, therefore, the trusts of the 2000*l.*, except as to the life interest given to Mrs. Mabey, are void.

Solicitors for all parties: *Woodhouse & Davidson.*

F. E.

PARKER J. 1912 *Feb.* 20, 21, 22; *March* 15.

GARDNER *v.* IREDALE.

[1911 G. 1928.]

Company—Meetings—Statutory Meeting—Notice—Shares—Allotment as fully paid—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 65.

The T. company was incorporated as a company limited by shares under the Companies (Consolidation) Act, 1908, on January 3, 1911, and, being a private company, it was entitled to commence business immediately on its incorporation. Its articles of association provided that the statutory meeting of the company should be held at such time (within the statutory limit) and at such place as the directors should determine, and that the notices convening general meetings of the company (whether ordinary or extraordinary) must specify the general nature of the business to be transacted thereat.

The T. company held only two general meetings—one of which, held on January 30, 1911, was for the purpose of passing, and the other, on February 14, 1911, was for the purpose of confirming, a special resolution for the increase of the company's share capital. The meeting of January 30 was held too soon to be the statutory meeting of the company; and the notices of the meeting of February 14 referred only to the business of confirming the resolution passed at the previous meeting; but this meeting, so far as its date was concerned, might have been the statutory meeting. (See s. 65 of the Act of 1908.)

The L. company on February 13, 1911, entered into an agreement with one Crossman for a lease to the L. company of land for fifty years from September, 1910, at a yearly rent of 120*l.*, under which lease the L. company was to erect a theatre on the site to be demised within a certain time, and the lease was not to be granted till this was done. On March 15, 1911, the L. company entered into an agreement with the T. company whereby it was agreed that the T. company should buy the benefit of the agreement of February 13, 1911, and that the L. company

should with all convenient speed build and equip a theatre on the site, the inclusive price for the benefit of the agreement and the building and equipment being agreed at 9000*l.*, to be satisfied by the allotment to the L. company of 36,000 fully-paid shares of 5*s.* each in the T. company, which were to be allotted on the sealing of the agreement.

The L. company proceeded with the erection of the theatre, but went into voluntary liquidation before its completion and were unable to complete it. The landlord afterwards re-entered on the land, and the agreement of February 13, 1911, was at an end.

The liquidator of the L. company agreed to sell some of the 36,000 paid-up shares to the defendants, and the agreement provided that it should at the option of the defendants become void if it should be found that the requirements of the Companies (Consolidation) Act, 1908, had in any way been infringed by the T. company.

By a letter dated October 5, 1911, the defendants exercised their option to avoid the agreement, and (in an action by the L. company and their liquidator for specific performance of an agreement to sell the shares, they contended (1.) that no statutory meeting of the company had been held; and (2.) that it was ultra vires the T. company to allot the shares as fully paid, if they were in fact allotted, having regard to the fact that that company derived no benefit from the agreement under which they were to be allotted:—

Held, that if the meeting of February 14, 1911, was intended to be the statutory meeting, it was not properly convened, for, if it was to be the statutory meeting, the notices convening it should have so stated, and therefore the T. company had not in fact complied with the requirements of s. 65 of the Act as to the statutory meeting.

Semble, there is no objection to an agreement by a limited company that a debt which it presently owes shall be satisfied by the allotment of fully-paid shares of the same nominal amount; and the contract of March 15, 1911, could and should be read as a contract to build a theatre in consideration of 9000*l.* payable upon the sealing of the agreement, with a provision that the 9000*l.* should be satisfied by the issue of fully-paid shares to that amount, and, so read, was valid.

THE London and General Electric Theatres, Limited (below called the London company), was incorporated on September 27, 1910, its objects being (amongst other things) to undertake and carry on the business of manufacturers of cinematograph films and apparatus, and opera-house, theatrical, or music-hall proprietors. Its memorandum of association also gave it powers to acquire real or personal property, erect and construct theatres, to sell all or any of its property, and to accept payment in cash or shares, and to promote other companies.

The London company or some of its officers registered another company called the Torquay Electric Theatre, Limited. This

PARKER J. 1912 GARDNER v. IREDALE.

company (below called the Torquay company) was incorporated on January 3, 1911, as a private company, limited by shares, under the Companies (Consolidation) Act, 1908 (1), and with a share capital of 10,000*l.* divided into 40,000 shares of 5*s.* each.

One of the objects of the Torquay company was to acquire at Torquay a theatre intended primarily for the purposes of electric and cinematographic entertainments and works convenient for the purposes thereof, and to carry on the same, and with a view thereto to enter into and carry into effect, with or without modification, certain agreements referred to in clause 3 of the company's articles of association.

By clause 3 of the articles it was provided that the company should forthwith enter into certain agreements, one of which was an agreement with the London company "for the erection by that company for this company of a theatre at Torquay in the county of Devon in the terms of the draft" therein referred to, "with full power nevertheless from time to time to agree to any modification of the terms of such agreements or either of them, either before or after the execution thereof respectively." The

(1) 8 Edw. 7, c. 69. Sub-ss. 1, 6, and 7 of s. 65 of the Act are as follows:—

"(1.) Every company limited by shares and registered on or after the first day of January nineteen hundred and one shall, within a period of not less than one month nor more than three months from the date at which the company is entitled to commence business, hold a general meeting of the members of the company which shall be called the statutory meeting."

"(6.) The directors shall cause a list showing the names, descriptions, and addresses of the members of the company, and the number of shares held by them respectively, to be produced at the commencement of the meeting, and to remain open and accessible to any member of the company during the continuance of the meeting."

"(7.) The members of the company present at the meeting shall be at liberty to discuss any matter relating to the formation of the company, or arising out of the statutory report, whether previous notice has been given or not, but no resolution of which notice has not been given in accordance with the articles may be passed."

Sub-ss. 2 to 5 contain provisions as to forwarding and filing of what is therein described as "the statutory report," but by sub-s. 10 "The provisions of this section as to the forwarding and filing of the statutory report shall not apply in the case of a private company."

By s. 129 of the Act of 1908, "a company may be wound up by the Court . . . . if default is made in filing the statutory report or in holding the statutory meeting."

articles of association of the Torquay company also provided as follows:—

"35. The statutory meeting shall be held at such time, within a period of not less than one month nor more than three months from the date of the company's incorporation, and at such place as the board may determine.

"36. Other general meetings shall be held once in every year after the year in which the company is incorporated, at such time and place as may be prescribed by the company in general meeting, and if no time or place is so prescribed, as may be determined upon by the board.

"37. The general meetings prescribed in the last preceding article shall be called ordinary general meetings; all other general meetings shall be called extraordinary general meetings.

"38. The board may, whenever they think fit, convene an extraordinary general meeting . . . .

"39. Seven days notice of any general meeting, specifying the day, hour, and place of the meeting, shall be given to the members in manner hereinafter mentioned . . . .

"40. The notice convening an ordinary general meeting shall state the general nature of any business intended to be transacted thereat, other than declaring dividends, electing directors and auditors and voting their remuneration, and considering the accounts presented by the board and the reports of the board and the auditors. The notice convening an extraordinary general meeting shall state the general nature of the business intended to be transacted thereat." (1)

The Torquay company held only two general meetings—one of which, held on January 30, 1911, was for the purpose of passing, and the other, on February 14, 1911, was for the purpose of confirming, a special resolution for the increase of the company's share capital. The meeting of January 30 was held too soon to be the statutory meeting of the company; and the notices of the meeting of February 14 referred only to the business of confirming the resolution passed at the previous

(1) Compare clauses 45, 46, and 47 of Table A in the First Schedule to the Companies (Consolidation) Act, 1908, under which the statutory meeting seems to be an ordinary meeting.

PARKER J. 1912 GARDNER v. IREDALE.

meeting, but this meeting so far as its date was concerned might have been the statutory meeting.

The London company on February 13, 1911, entered into an agreement with one Crossman for a lease to the London company of land at Torquay for fifty years from September, 1910, at a yearly rent of 120*l.*, under which the London company were to erect a theatre on the site to be demised to them within a certain time, and the lease was not to be granted till this was done. On March 15, 1911, the London company entered into an agreement with the Torquay company, whereby it was agreed that the London company should sell and the Torquay company should buy the full and exclusive benefit of the agreement of February 13, 1911, and that the London company should with all convenient speed build and completely finish and equip a theatre on the site, the inclusive price for the benefit of the agreement and the building and equipment being agreed at 9000*l.*, to be paid and satisfied by the allotment to the London company or their nominees of 36,000 fully-paid shares of 5*s.* each in the Torquay company, which were to be allotted on the sealing of the agreement. By a deed of even date the London company assigned the agreement of February 13, 1911, and the full benefit thereof to the Torquay company.

The London company proceeded with the erection of the theatre, but went into voluntary liquidation before its completion and were unable to complete it. The landlord afterwards re-entered on the land, and the agreement of February 13, 1911, was at an end.

J. C. Gardner was the liquidator of the London company, and by an agreement dated August 31, 1911, and made by him as such liquidator of the one part, and G. H. Iredale, W. W. Cox, and C. M. Myott of the other part, Gardner agreed to sell to them 20,760 of the above-mentioned 36,000 shares. The agreement provided that it should at the option of the purchasers become void and of no effect if it should be found that the requirements of the Companies (Consolidation) Act, 1908, had in any way been infringed by the Torquay company and not waived by the Registrar of Joint Stock Companies, and that the agreement should be provisional upon the approval of

the creditors of the London company and or the Court sanctioning the sale, such approval and sanction to be obtained within ten days from the date of the agreement.

The present action was brought by Gardner as liquidator of the London company, and by that company, against Iredale, Cox, and Myott, and the plaintiffs claimed specific performance of the agreement.

The action was tried by Parker J. on February 20, 21, and 22, 1912.

Romer, K.C., and *J. H. Stamp*, for the plaintiffs.

A. Grant, K.C., and *H. Johnston*, for the defendants. Apart from other defences raised by the pleadings and on which we rely, it is clear that the Torquay company did not comply with the requirements of the Companies (Consolidation) Act, 1908, and equally clear that the Registrar of Joint Stock Companies could not waive such requirements. One of such non-compliances was the failure of the Torquay company to hold any "statutory meeting," as required by s. 65 of the Act. That section requires the meeting to be held within a period of not less than one month or more than three months from the date when the company is entitled to commence business. The restrictions on commencement of business imposed by s. 87 of the Act of 1908 do not apply in the case of private companies (see s. 87, sub-s. 6); and the Torquay company, therefore, was entitled to commence business on the day it was incorporated, January 3, 1911. The company only held two general meetings. One of them was held on January 30, 1911, within a month of the incorporation, so that this could not be the "statutory meeting." The other meeting, held on February 14, 1911, might have been the statutory meeting if it had been properly convened for that purpose, but it was convened only to confirm as a special resolution the resolution for an increase of capital passed at the former meeting. The articles provide for (clause 35) the statutory meeting, (clause 36) annual general meetings, and (clause 38) extraordinary general meetings. Clause 37 says that the annual meetings shall be called ordinary general meetings and that all other general meetings shall be called extraordinary

PARKER J. 1912 GARDNER v. IREDALE.

general meetings. The statutory meeting of this company would therefore be an extraordinary general meeting. But whether it was such a meeting or an ordinary general meeting, the notice convening it was required (clause 40) to "state the general nature of the business intended to be transacted thereat." The notice of the meeting of February 14 said nothing about its being the statutory meeting, the only intended business referred to being the confirmation of the resolution passed at the previous meeting. The statutory meeting, therefore, was never held, and the requirements of the Act of 1908 were not complied with. The neglect to hold the meeting rendered the company liable, under s. 129 of the Act, to be wound up.

Another objection is that the agreement of March 15, 1911, was ultra vires the Torquay company. It was an agreement to issue at once fully-paid shares for a consideration which ostensibly was the assignment of the agreement for a lease and the erection in the future, by the London company, of a theatre. But the land to be demised was of no value, as the lease was to be at a rack rent, and the only value to be given for the shares was the agreement to build in the future.

The agreement to build in the future was not such an agreement as would make the shares, even if they were allotted, fully-paid shares. In *Pellatt's Case* (1) there was an agreement that a company should take goods from Pellatt, on Pellatt's taking shares in the company, upon the terms that orders for goods should be given, out of the price of which the calls on the shares were to be paid. Turner L.J. said: "On this two questions arise: (1.), was it within the powers of the directors to enter into such an agreement with Pellatt so as to bind the company? and (2.), if it was, what was the result of the stipulations on the part of the company becoming incapable of being performed? On the first question, I do not mean to go the length of saying that in no case, and under no circumstances, can the directors enter into a contract with a tradesman, who undertakes to supply goods to the company, that the price of the goods shall be set off against the calls upon shares taken by him. Possibly such a contract may, in some cases, be capable of being entered into. But in

(1) (1867) L. R. 2 Ch. 527, 532.

ordinary cases such a contract would, in my opinion, be ultra vires, because it alters the tradesman's position as a shareholder from his position as defined by the Companies Act. If he should fail in the performance of his part of the contract, and neither supply goods nor pay calls, the company would have no remedy against him but by action for breach of contract, whereas, by the Act of Parliament, the liability to pay calls is a specialty debt, and the company has the usual remedies of a specialty creditor. I do not think that it is within the powers of directors to alter the position of a shareholder in this way, and on this ground, apart from other considerations tending the same way, I think this agreement not binding on the company." *Pellatt's Case* (1) is directly in point here, and binding on this Court as a decision of the Court of Appeal. The Torquay company could not substitute the contract to do something in the future, for the breach of which only damages could be sued for, for the liability to pay calls.

[PARKER J. In *Pellatt's Case* (1) Pellatt was trying to get off the list of contributories.]

Yes, and he got off on the ground that the company was not in a condition to perform its part of the contract, and as there could not be any more orders for goods, Pellatt was not bound to perform his part of the agreement. In the present case, as the London company cannot perform its part of the agreement, the Torquay company cannot treat it as the holder of fully-paid shares.

In *In re Wragg, Ld.* (2) Lindley L.J. says it is "beyond the power of a limited company to release a shareholder from his obligation without payment in money or money's worth. It cannot give fully paid up shares for nothing and preclude itself from requiring payment of them in money or money's worth: *In re Eddystone Marine Insurance Co.* (3); nor can a company deprive itself of its right to future payment in cash by agreeing to accept future payments in some other way. It cannot substitute an action for the breach of a special agreement for a statutory action for non-payment of calls: see *Pellatt's Case*." (1)

(1) L. R. 2 Ch. 527, 532. (2) [1897] 1 Ch. 796, 829.
(3) [1893] 3 Ch. 9.

PARKER J. 1912 GARDNER v. IREDALE.

The law is the same under the Act of 1908. By s. 14, sub-s. 2, all money payable by any member to the company under the memorandum or articles is to be a debt due from him to the company in the nature of a specialty debt. The company cannot release that debt in consideration of something contracted to be done in the future. The debt must be paid in cash or by set-off, or there must be a valid accord and satisfaction. Here it may be said that there was accord but that there could be no satisfaction until the theatre was completed. Shares should not be issued as fully paid until the services have actually been rendered.

The plaintiffs may rely on *Chapman's Case* (1), as being a decision that fully-paid shares may be allotted in præsenti in consideration of future services, but in that case Chapman agreed to hand over property to the company the value of which was not ascertained, and a premium was offered to him to assume the office of managing director.

The Court will not order specific performance of a contract to buy fully-paid shares where the shares are not paid up at all and the purchaser will be liable to pay up the shares to the company.

Romer, K.C., and *J. H. Stamp.* Of course the meeting of January 30, 1911, could not be the statutory meeting of the company, but there is no reason why that of February 14 should not be. Sect. 65 of the Act of 1908 is silent as to how the statutory meeting is to be convened. In the case of a private company, like the Torquay company, there is apparently no useful object to be gained by holding a statutory meeting. Sub-ss. 2 to 5, as to sending out, certifying, and filing the statutory report, do not apply in the case of private companies (see sub-s. 10). All that need be done by the directors is to produce a list of the members, with their descriptions, addresses, and shareholdings, and to give them an opportunity of discussing any matters relating to the formation of the company. The Torquay company had only two shareholders, both of whom knew all about the formation already.

The meeting of February 14 was not less a statutory meeting because the articles called it an extraordinary meeting, and it

(1) [1895] 1 Ch. 771.

was sufficient if the notice convening it referred to the resolution which was to be passed, for no resolution can be passed at a statutory meeting unless notice of it has been given in accordance with the articles (see s. 65, sub-s. 7). It is for the defendants to shew that the requirements of the Act have not been complied with.

The point taken as to the shares not being fully paid is wholly bad. The circumstances of *Pellatt's Case* (1) were quite different from those of the present case. The tradesman, Pellatt, never asked for fully-paid shares, and no notice of allotment was given to him, although he was placed on the register of shareholders. The agreement was that the company was to order goods from him and that he was to take shares, and that the price of the goods when from time to time ordered was to be set off against the calls when made in the future. No goods were ever ordered, or after the winding-up could be ordered, and all the Court held was that, as the company had not performed its part of the contract, the tradesman was not bound to perform his part.

What the defendants say here is that it is ultra vires to issue paid-up shares now in consideration of something to be done in the future. If that proposition is sound, it cannot be confined to the case where something is to be done by the vendor, but must extend to the assignment of the benefit of a contract to be performed by some one else.

[PARKER J. In that case property is assigned.]

A share may be allotted as fully paid up in respect of property, goods, or services received by the company, and the Courts will not inquire into the adequacy of the consideration: *Ooregum Gold Mining Company of India* v. *Roper* (2); *Chapman's Case*. (3)

A company can enter into a binding contract to employ a person as an officer or servant for a future period for a lump sum to be paid down in cash at once; and if it can do so, it can further agree that the sum shall be paid or satisfied by the allotment at once of fully-paid shares of equal nominal value. What it cannot do is to allot shares at once and contract that calls on the shares when made shall be set off against the price

(1) L. R. 2 Ch. 527. (2) [1892] A. C. 125, 136, 140.
(3) [1895] 1 Ch. 771.

PARKER J. 1912 GARDNER v. IREDALE.

of goods to be supplied in the future, for to justify a set-off the call on the shares and the debt due to the company must both be immediately payable: *Spargo's Case.* (1)

The legal position now is exactly as it was under the Companies Act, 1862, before the passing of s. 25 of the Companies Act, 1867, that is to say, if a man contracts to take shares he must pay, either in money or money's worth, and payment in either will be a satisfaction, and if there is a contract of such a nature that on proceedings taken by the company it could not be set aside, a payment for shares in kind according to that contract is legal: *In re Baglan Hall Colliery Co.* (2)

It is immaterial, on the question whether the shares were fully paid, whether the theatre was ever built or not, for failure of consideration for the contract is no ground for treating the shares as not being paid up: *Mege and Angier's Case.* (3)

A company may by proper entries make itself a debtor in præsenti for an instalment of a debt which theretofore was only payable in futuro: Buckley on Companies, 9th ed. p. 203. [They also referred to *Spitzel* v. *Chinese Corporation.* (4)]

Cur. adv. vult.

March 15. PARKER J. This is an action for the specific performance of an agreement, dated August 31, 1911, for the sale to the defendants by the plaintiff Gardner, as liquidator of the plaintiff company, of 20,760 fully-paid shares of 5*s.* each in the Torquay Electric Theatre, Limited, to which shares the plaintiff company claims to be entitled under an agreement with the Torquay Electric Theatre, Limited, dated March 15, 1911.

The agreement of August 31, 1911, recites (inter alia) that the shares in question had not yet been allotted to the plaintiff company, and that the liquidator had agreed, subject to the approval of the Court, to obtain an effectual title thereto, and to sell the same to the defendants for 250*l.* It also contains

(1) (1873) L. R. 8 Ch. 407.
(2) (1870) L. R. 5 Ch. 346, 354, 355.
(3) [1875] W. N. 208.
(4) (1899) 80 L. T. 347. See also *Schroder's Case* (1870) L. R. 11 Eq. 131; *Pagin and Gill's Case* (1877) 6 Ch. D. 681; *Andress's Case* (1878) 8 Ch. D. 126; *White's Case* (1879) 12 Ch. D. 511.

provisions (1.) enabling the defendants to avoid the agreement if it were found that the requirements of the Companies (Consolidation) Act, 1908, had in any way been infringed by the Torquay company and not waived by the Registrar of Joint Stock Companies, and (2.) making the agreement conditional upon the approval of the creditors of the plaintiff company and/or the Court sanctioning the sale, such approval and consent to be obtained within ten days from the date of the agreement. Inasmuch as the Registrar of Joint Stock Companies has no power to waive any of the requirements of the Companies (Consolidation) Act, 1908, or any statutory consequence of non-compliance with any such requirement, the agreement must in my opinion be taken as voidable if any of such requirements had not in fact been complied with by the Torquay company. The defendants contend that the Torquay company had not complied with several of those requirements, and, in particular, that it had not complied with the provisions of s. 65 of the Act, relating to the statutory meeting.

The Torquay company was incorporated on January 3, 1911. It has held two general meetings only—the first on January 30, 1911, for the purpose of passing, and the second on February 14, 1911, for the purpose of confirming, a special resolution for the increase of the company's capital. The Torquay company, being a private company, was entitled to commence business immediately on its incorporation. The meeting of January 30, 1911, was held within a month of the incorporation of the company, and could not, therefore, have been the statutory meeting. The meeting of February 14, 1911, so far as the date at which it was held is concerned, might have been, and the plaintiffs say that it was, the statutory meeting.

The provisions of s. 65 of the Act as to the statutory report having no application to private companies, the objects of the statutory meeting of a private company must be gathered from sub-ss. 6, 7, and 8 of s. 65 of the Act. From these sub-sections it would appear that the meeting is intended to have before it a list of the members of the company, with their names, descriptions, and addresses, and the number of shares held by them respectively, and to have an opportunity of discussing any matter

PARKER J. 1912 GARDNER v. IREDALE.

relating to the formation of the company, and passing resolutions of which notice has been given in accordance with the articles, but not any other resolutions. The statutory meeting must be convened in manner provided by the articles.

The articles of the Torquay company provide that the statutory meeting shall be held at such time (within the statutory limit) and at such place as the directors determine. The directors never in fact fixed any time or place for the statutory meeting, nor did they cause to be laid before the meeting of February 14, 1911, any such list of members as provided by the Act. Further, the articles of the Torquay company provide that the notices convening general meetings of the company (whether ordinary or extraordinary) must specify the general nature of the business to be transacted thereat. The notice of the meeting of February 14, 1911, referred only to the business of confirming the resolution passed on January 30, 1911, for increasing the company's capital. In my opinion, therefore, it is reasonably clear that no one intended the meeting of February 14, 1911, to be, or considered that it was, the statutory meeting. Further, if any one did intend that the meeting of February 14, 1911, should be the statutory meeting, I do not think such meeting was properly convened, for if it was to be the statutory meeting the notices convening it should have so stated. I hold, therefore, that the Torquay company had not in fact complied with the requirements of the 65th section of the Act as to the statutory meeting, and was, therefore, at the date of the agreement sued on, liable to be wound up for breach of such provisions.

The plaintiffs, however, in order to meet this difficulty, set up that the clause of the agreement enabling the defendants to avoid the contract for non-compliance with the requirements of the Companies (Consolidation) Act, 1908, had on September 8, 1911, at a meeting of the principal creditors of the plaintiff company, been abrogated by mutual consent and could not be relied on by the defendants at all. [His Lordship said that what precisely happened at this meeting was the subject of extremely conflicting evidence, and after dealing with this evidence he proceeded as follows:] No one, throughout the meeting, or, so far as I can discover, ever, thought of the clause enabling the defendants to

avoid the contract for non-compliance by the Torquay company with the requirements of the Companies (Consolidation) Act, 1908. The plaintiffs cannot, in my opinion, put the result of the meeting higher than this, namely, that all parties at the interview assented to the position that the condition as to the approval of the creditors or the sanction of the Court would be satisfied by the approval of the creditors present at the meeting, which approval was in fact given.

In the view I take it is not necessary to determine whether, on the true construction of the agreement, this position was tenable. In any case it seems to me that the clause enabling the defendants to avoid the contract for non-compliance with the Act remained unaffected, and, inasmuch as the Torquay company had not held the statutory meeting, the defendants had the right to avoid it, which they did by letter dated October 5, 1911.

It was pressed on me in argument, and I agree, that, in the particular circumstances of the Torquay company, the provisions of the Act as to the statutory meeting could serve no useful purpose. The company had only two shareholders, namely, the two gentlemen who signed the memorandum of association. Each held only one 5*s*. share. One was a director and the other the secretary of the company. Both were fully aware of all the circumstances connected with its promotion, one being a director and the other the secretary of the plaintiff company, who procured its registration. Still the provisions of s. 65 of the Act, as to the statutory meeting, are incumbent on every company incorporated under the Act, and their breach makes a company liable to compulsory winding up. In my opinion, the particular circumstances of the present case afford no reason why the defendants should not rely on the strict letter of their bargain, and the action fails on this ground alone.

There is, however, another defence raised upon which, involving as it does questions of fact on which the evidence is conflicting, I ought, in case the matter goes further, to express an opinion. The Torquay company was promoted by the plaintiff company for the purpose of acquiring and carrying on at Torquay a theatre intended primarily for electric and

PARKER J. 1912 GARDNER v. IREDALE.

cinematographic entertainments, and with a view thereto of entering into the agreement specified in the articles, including an agreement with the plaintiff company for the erection by that company of a theatre at Torquay. The articles, in the usual way, preclude objection being taken to these agreements on the ground that the directors of the Torquay company do not constitute an independent board. On February 13, 1911, the plaintiff company entered into an agreement with one Crossman for a lease to the plaintiff company of certain premises at Torquay for fifty years from September 29, 1910, at a rent of 120*l.* per annum. By this agreement the plaintiff company were to erect a theatre, on the premises to be demised, within six months of possession being given, and the lease was not to be granted till this was done. On failure to do it the landlord had power to re-enter and put an end to the agreement. On March 15, 1911, the plaintiff company entered into an agreement with the Torquay company whereby, after reciting the incorporation of the Torquay company for the purpose (inter alia) of entering into the agreement with the plaintiff company referred to in the articles, and that the parties had agreed to certain modifications of such agreement, it was agreed (1.) that the Torquay company should buy the benefit of the agreement of February 13, 1911; (2.) that the plaintiff company should, with all convenient speed, build and equip on the premises comprised in the agreement of February 13, 1911, a theatre designed for the production of electric, cinematographic, theatrical and other entertainments; (3.) that the inclusive price for the benefit of the agreement of February 13, 1911, and for building and equipping the theatre should be 9000*l.*, which should be paid and satisfied by the allotment of 36,000 fully-paid shares of 5*s.* each in the Torquay company, such shares to be numbered 1 to 36,000 inclusive; and (4.) that the said shares should be allotted to the plaintiff company on the sealing of that agreement.

I have no evidence as to how the agreement referred to in the articles was modified by the agreement of March 15, 1911, but it looks as if one of the modifications was the clause under which the Torquay company were to purchase the benefit of the agreement of February 13, 1911, which had been entered into with

the plaintiff company, and not, as may originally have been intended, by the Torquay company. At any rate, by an indenture of even date, the benefit of the agreement of February 13, 1911, was assigned to the Torquay company in consideration of the usual covenant for indemnity, the assignment bearing a 10*s.* stamp, and not being stamped ad valorem upon the 9000*l.* or any part thereof.

The plaintiff company proceeded with the erection of a theatre on the premises agreed to be leased to them, but went into voluntary liquidation before its completion, and was unable to complete it. The landlord has since re-entered on the premises agreed to be demised, and the agreement of February 13, 1911, is at an end. By reason, therefore, of the default of the plaintiff company the Torquay company will derive no benefit whatever under the agreement of March 15, 1911, and, if the plaintiff company is still entitled thereunder to 36,000 fully-paid shares, will in effect lose 9000*l.*, less such dividend, if any, as they may be paid in the liquidation of the plaintiff company on any damages for which they may be allowed to prove in such liquidation.

[After referring to other facts in the case which are not material to the points which are the subject of this report, his Lordship continued as follows:]

The landlord re-entered on September 8 or 9, and the defendants, being advised that they could obtain no relief from the forfeiture, on October 5 repudiated the agreement sued on, on the grounds (1.) that the requirements of the Companies (Consolidation) Act, 1908, had not been complied with by the Torquay company; (2.) that the plaintiff company could not under the circumstances make a title to the shares in question; and (3.) that the agreement of March 15, 1911, was ultra vires the Torquay company.

[After dealing with the question of title, and deciding, under the circumstances referred to by him, that the plaintiff company would not be entitled to specific performance of its agreement with the Torquay company and therefore could not make a title to the shares agreed to be sold, his Lordship concluded as follows:]

With regard to the defendants' contention that the agreement of March 15, 1911, was wholly ultra vires, it was based on the

PARKER J. 1912 GARDNER v. IREDALE.

principles laid down in *Pellatt's Case* (1) and by Lindley L.J. in *In re Wragg, Ld.* (2) These cases appear to decide that, though the statutory liability incident to the holding of shares in limited companies may be satisfied by proof of payment or of accord and satisfaction, it is not open to a company to agree with the holder or proposed holder of its shares to replace the statutory liability by a special contract sounding in damages only. The defendants say that this is precisely what is affected to be done by the agreement of March 15, 1911, the statutory liability on the 36,000 shares to be allotted thereunder being replaced by a special contract to erect a theatre, the remedy for the breach of which would be in damages only. On the other hand, there seems to be no objection to an agreement by a limited company that a debt which it presently owes shall be satisfied by the allotment of fully-paid shares of the same nominal amount. If, therefore, the contract of March 15, 1911, can be read as a contract to build a theatre in consideration of 9000*l.* payable upon the sealing of the agreement, with a provision that the 9000*l.* shall be satisfied by the issue of fully-paid shares to that amount, it would I think be valid. On the whole, I incline to the view that this agreement ought to be so read, but it is not necessary in the circumstances actually to decide this point.

The action will be dismissed with costs.

Solicitors for plaintiffs: *Billinghurst, Wood & Pope.*

Solicitors for defendants: *Evelyn Jones & Co., for Smith & Kenny, Torquay.*

(1) L. R. 2 Ch. 527. (2) 1897] 1 Ch. 829.

F. E.

C. A.
1912
Feb. 29;
March 4, 5.

In re ROBINSON'S SETTLEMENT.
GANT *v.* HOBBS.

[1908 R. 70.]

Money-lender—Registration—Security taken by Unregistered Money-lender—"Course of his business"—Private Investment—Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 2, *sub-s.* 1 (*a*), (*c*)—*Settlement—Power to Trustees to raise Money with Consent of Tenant for Life—Bankruptcy of Tenant for Life—Consent prejudicial to Interest of Trustee in Bankruptcy—Mortgage—Covenant by Trustees "as such trustees but not otherwise"—Personal Liability—Practice—Pleading Money-lenders Act—Rules of the Supreme Court,* 1883, *Order* XIX.

By his marriage settlement R. assigned funds to trustees upon trusts under which he took a protected life interest and the trustees were empowered to pay his debts and for that purpose to raise money upon his request in writing. In November, 1906, he committed an act of bankruptcy on which he was adjudicated a bankrupt in April, 1907. In December, 1906, he signed a request to the trustees to raise 800*l.* for payment of his debts. They borrowed the money from G. and executed a mortgage in which they covenanted "as such trustees but not otherwise" to repay the money with interest at 6 per cent. G. brought this action to enforce his security. Warrington J. held that G. was an unregistered money-lender, but that the mortgage was valid because it was not taken in the course of his business as a money-lender but as a private investment; that R.'s consent was a protected transaction within s. 49 of the Bankruptcy Act, 1883; and that the trustees, one of whom had not pleaded the Money-lenders Act, were personally liable on their covenant:—

Held (reversing the decision of Warrington J.), that the mortgage was taken by G. in the course of his business as a money-lender and was therefore entirely void inasmuch as he was not registered; that, that being so, the debt was gone and G. could not succeed in a claim for money had and received; that G. had not been taken by surprise, and under the circumstances the omission of one of the trustees to plead the Money-lenders Act was immaterial.

Per Buckley L.J.: The covenant did not bind the trustees personally.

Appeal from a decision of Warrington J.

Under the will of John Peter Robinson, his son, Edward Arthur Robinson, subject to his attaining the age of twenty-five years, became entitled to a sum of upwards of 400,000*l.*, on which he created incumbrances to the amount of about 160,000*l.* Under those circumstances, on August 8, 1903, he executed a

C. A. 1912

ROBINSON'S SETTLEMENT, *In re.* GANT *v.* HOBBS.

settlement on the occasion of his marriage. It was made between himself of the first part, his intended wife of the second part, and two trustees, the defendants Hobbs and Stevens, of the third part. By the deed Edward Arthur Robinson assigned to the trustees "All that the sum of 200,000*l.* sterling which he the settlor hereby appropriates out of and constitutes a first charge upon all his share and interest of and in the ultimate residue of the residuary real and personal estate of the said testator under his said will to which he will become absolutely entitled upon attaining the age of twenty-five years," subject to certain mortgages, to hold unto the trustees upon trust to invest. The beneficial trusts were, first, out of the income to pay to the intended wife an annuity of 200*l.* a year, and subject thereto to pay the residue of the annual income to the settlor until he should assign, charge, or encumber, or until, either by his own act or by operation of law, the income would become payable to some other person. This protected life interest was followed by a discretionary trust in favour of the settlor, his wife and children, and remoter issue, followed by an ultimate trust that the income not applied under the discretionary trust should be held upon the trusts on which the income would be held if the settlor were dead. After the death of the settlor the trustees were to pay the income to the wife for her life if she should survive, and then followed the usual trusts for the issue or children of the marriage, and there was an ultimate trust in default of issue for the settlor, his executors, administrators, and assigns. One of the powers given to the trustees was as follows: "It shall be lawful for the said trustees or trustee to apply any part of the trust fund (for which purpose they or he shall have full power of sale or mortgage) for the purpose of paying off or compounding any debts secured or unsecured incurred by the settlor upon his request in writing." At the time when the settlement was executed, and for a considerable time afterwards, the trust moneys were not in fact in the hands of the trustees. They did not reach them until orders were made in an action for the administration of the estate of the late John Peter Robinson, first in 1910, and secondly on May 5, 1911. Subsequently to the date of the settlement Edward Arthur

Robinson attained twenty-five, and thereby he became, and through him his trustees became, absolutely entitled to this sum of 200,000*l.*, though it had not actually been paid into their hands. On November 5, 1906, he committed an act of bankruptcy by not complying with a bankruptcy notice. On December 18 in that year he signed this document addressed to the two trustees, Hobbs and Stevens: "Gentlemen, whereas, by an indenture, dated 8th day of August, 1903,"—then he described the settlement and referred to the power—"and whereas I am now indebted to various persons in amounts which with the costs of and incident to the proposed mortgage exceed the sum of 800*l.* I hereby request you as such trustees to raise the sum of 800*l.* by mortgage of the said trust fund and after paying and providing for the costs of the mortgagees of and incident to the mortgage to apply the residue of the said sum of 800*l.* in paying off such of my debts as I shall hereafter direct." In pursuance of that request, on December 20, 1906, the solicitors of the trustees applied to the plaintiff, Gant, to make them a loan. The plaintiff refused, and they ultimately, in the year 1907, approached him with a view to his advancing the 800*l.* upon the security which was afterwards executed. On January 16, 1907, the receiving order was made. Up to that time it was not suggested that the plaintiff had any notice of any act of bankruptcy, or that his proceedings were otherwise than bona fide. On April 30, 1907, the settlor was adjudicated bankrupt upon a petition presented upon November 14, 1906. On February 19, 1907, the mortgage was executed. It was supplemental to the will of John Peter Robinson and to the settlement and recited certain other charges or mortgages effected by the trustees under the power in question, the request of December 18, 1906, and the agreement for a loan, and it witnessed that in pursuance of the agreement "and in consideration of the sum of 800*l.* now paid by the mortgagee to the trustees"—which was the fact—"the trustees as such trustees but not otherwise hereby covenant with the mortgagee to pay to him on the 19th day of August next the sum of 800*l.* with interest thereon in the meantime at the rate of 6*l.* per cent. per annum from the date of these presents and also, so long as any principal moneys shall remain owing upon the

C. A. 1912

ROBINSON'S SETTLEMENT, *In re.* GANT *v.* HOBBS.

security of these presents, to pay to the mortgagee interest thereon at the rate aforesaid by equal half-yearly payments on the 19th day of February and the 19th day of August in each year"; and in further pursuance of the agreement and for the consideration aforesaid the trustees in exercise of the powers conferred upon them by the settlement conveyed and assigned unto the mortgagee the trust funds to hold, subject to certain prior incumbrances, and subject to redemption in the ordinary form.

Gant brought this action to enforce his security and asked for an account of what was due to him under the trustees' covenant and judgment against them; an account of what was due to him under the mortgage; and foreclosure or sale.

Warrington J. held that the plaintiff was an unregistered money-lender, but that the mortgage was valid inasmuch as it was not made in the course of his business; that the giving of his consent by the settlor was not void on the ground of its being prejudicial to the interests of the trustee in his bankruptcy, but was a protected transaction within s. 49 of the Bankruptcy Act, 1883; that the covenant by the trustees in the mortgage did not mean that they were to be only liable to pay out of moneys in their hands as trustees, but that they were personally liable to pay; and he gave judgment against them jointly and made an order for foreclosure.

The defendants appealed.

H. Terrell, K.C., and *Knowles Corrie*, for Stevens and for new trustees appointed since the date of the mortgage. The mortgage is invalid for several reasons. First, the trustees could only make a valid mortgage on the request of E. A. Robinson. At the time when he made the request he was a bankrupt and was therefore not in a position to make a request which would operate prejudicially to the interests of the trustee in his bankruptcy by removing some of his assets. The trustee has assigned all the bankrupt's interest in the funds to us, so the former is not a necessary party to these proceedings. The trustee's title relates back to a date prior to the making of the request: Bankruptcy Act, 1883, ss. 9, 43. The debtor's property was then vested in

the trustee: s. 44. Sect. 49 only protects transactions for valuable consideration, and the conditions of s. 49, sub-ss. 1 and 2, were not complied with. The debtor could not without his trustee's consent lawfully do anything which diminished the property in the hands of his trustee: *In re Cooper* (1); *In re Bedingfield and Herring's Contract.* (2) It is even possible that the power to request had itself passed to the trustee: s. 44, sub-s. 2 (ii.).

Secondly, the trustees who gave the covenant in the mortgage only did so "as such trustees but not otherwise." Therefore the liability is limited to the trust funds in their hands and they are not personally liable. A proviso which only qualifies the personal liability is valid: *Williams* v. *Hathaway.* (3) The words "not otherwise" were clearly intended to restrict our liability.

[BUCKLEY L.J. referred to *Muir* v. *City of Glasgow Bank* (4) and *Gordon* v. *Campbell.* (5)]

Warrington J. followed his own decision in *Watling* v. *Lewis* (6), in which those cases were not cited, and held that the words "as such trustees but not otherwise" were repugnant to the covenant and had no effect. We ask the Court to overrule that decision.

Thirdly, the mortgage is void because it was taken by an unregistered money-lender "in the course of his business": s. 2, sub-s. 1 (*c*), of the Money-lenders Act, 1900. The only ground for holding that it was not "in the course of his business" was that interest at 6 per cent. was not high enough to be money-lenders' interest.

[They were stopped by the Court.]

Hume-Williams, K.C., and *W. H. Cozens-Hardy*, for Hobbs, who had executed the mortgage as trustee and had subsequently retired from the trusts, supported the same contention.

Cave, K.C., and *Whitmore Richards*, for Gant. There is no evidence to shew that any transaction at the time of this mortgage was "in the course of" Gant's business as a money-lender,

(1) (1884) 27 Ch. D. 565.
(2) [1893] 2 Ch. 332.
(3) (1877) 6 Ch. D. 544.
(4) (1879) 4 App. Cas. 337, 355.
(5) (1842) 1 Bell, App. 428, 457.
(6) [1911] 1 Ch. 414.

C. A 1912

ROBINSON'S SETTLEMENT, *In re.* GANT *v.* HOBBS.

and the circumstances shew that this mortgage in particular was not. There was no evidence of the existence of any money-lending transaction or business. Gant was trying to start business and made this advance as a friend. This is shewn by the low rate of interest and the correspondence. At all events Stevens has not pleaded the Money-lenders Act and cannot avail himself of that defence.

COZENS-HARDY M.R. I think it will be convenient to dispose of this point first. The question is whether Gant, the respondent on this appeal, can claim to be entitled to a charge which was given to him in February of 1907. The learned judge has found as a fact, and it seems to me a fact which he was perfectly justified in finding, that Gant was, and is, a money-lender within the meaning of the Act. [His Lordship referred to the evidence.] I think we should be shutting our eyes beyond reason and declining to draw a most obvious conclusion if we did not agree with the learned judge when he says "I find as a fact he was a money-lender at that time." If he was a money-lender he was not registered, and the security in question was not given in his registered name. The learned judge, having found that fact, says the transaction in question was not in the course of his business as a money-lender. With great respect to the learned judge, I am entirely unable to concur in that conclusion. [His Lordship referred to the evidence and correspondence, and continued:] It seems to me impossible to doubt that this was a security in the course of Gant's business as a money-lender, and that being so, having regard to the circumstances, which I need not refer to, the security qua security, qua charge, is invalid and cannot be supported. That is all I need say at present, as there are other points to be argued.

FLETCHER MOULTON L.J. On this point I have not the slightest doubt. The evidence that Gant was at the time a money-lender is simply overwhelming. [His Lordship referred to the evidence.] Then was this transaction in "the course of his business"? I do not understand how anything could be more in the course of his business. He was advertising to lend money as a money-

lender, and he made it the primary object of his business to lend money. He is applied to for a loan, and he refuses the business, as he calls it, in the first instance, and then when it is modified he accepts it. It appears to me to be typically in the course of his business. The only ground on which it is suggested that it was not in the course of his business was that the interest was not extortionate, but a man is a money-lender, whether he charges extortionate interest or not, if he comes within the definition of the Act, and that which he does in the course of his business is none the less so because the interest is reasonable. For these reasons it appears to me this was a transaction in the course of his business and the security must be invalid.

BUCKLEY L.J. I am of the same opinion and for the same reasons subject to adding a word with regard to an expression used by the Master of the Rolls in his closing words. The language of s. 2, sub-s. 1 (*c*), of the Act is: "shall not enter into any agreement in the course of his business as a money-lender with respect to the advance and repayment of money, or take any security for money in the course of his business as a money-lender, otherwise than in his registered name." I do not agree with the qualification expressed by the words that "the security qua security, qua charge, is invalid." It seems to me at present, subject to hearing Mr. Cave, that it is invalid altogether, and that those qualifying words should be omitted.

Cave, K.C., and *Whitmore Richards*. Even if this mortgage is invalid as a security we can recover the 800*l.* as money had and received. The decision in *Bonnard* v. *Dott* (1), following *Victorian Daylesford Syndicate, Ld.* v. *Dott* (2), appears to be against us on this claim, but the point was expressly left open in the subsequent case of *Chapman* v. *Michaelson*. (3)

[COZENS-HARDY M.R. The question did not arise in that case.]

Money had and received does not rest in agreement.

(1) [1906] 1 Ch. 740. (2) [1905] 2 Ch. 624.
(3) [1909] 1 Ch. 238, 242.

C. A. 1912 — ROBINSON'S SETTLEMENT, *In re* GANT *v.* HOBBS.

[FLETCHER MOULTON L.J. It rests in implied agreement, and in this case there is an express agreement.]

We ought to be restored to the position in which we should have been if there had been no agreement.

[COZENS-HARDY M.R. The agreement and the mortgage are entirely destroyed by the Act of Parliament. This contention is completely covered by *Bonnard* v. *Dott* (1), and you cannot recover in any way.]

If the Court is of opinion that the matter is closed it would not be right for us to pursue the point.

The next point is that Stevens has not pleaded the Money-lenders Act, 1900, so that he cannot take advantage of that defence. It is true that by paragraph 3 of his defence he does not admit that the mortgage constitutes a valid and effectual mortgage of the trust funds, but that is not sufficient.

[*H. Terrell, K.C.* You might have asked for particulars.]

[BUCKLEY L.J. referred to Rules of the Supreme Court, 1883, Order XIX., rr. 13, 14, and 15. There was no surprise, for the other defendants pleaded the Act.

COZENS-HARDY M.R. If it is necessary to plead the statute we shall certainly give leave to amend.]

Our rights are not affected by the pleadings of the other defendants: Order XXVII., r. 3, and cases thereunder cited in the Annual Practice.

[*H. Terrell, K.C.*, referred to *Scott* v. *Brown, Doering, McNab & Co.* (2); *McLeod* v. *Power*. (3)]

If your Lordships are against us on this point it is unnecessary to argue the remaining questions.

COZENS-HARDY M.R. The remaining point in this case is one which I do not think presents any serious difficulty. The action was brought by a money-lender seeking relief in respect of a security upon a trust fund, and seeking also relief in respect of certain covenants which were entered into by some of the defendants in the mortgage or charge in question. We have held already that the charge qua charge is invalid, and that the whole

(1) [1906] 1 Ch. 740, 745. (2) [1892] 2 Q. B. 724, 728.
(3) [1898] 2 Ch. 295.

transaction is void under the Money-lenders Act. The defence of the Act was raised by several of the defendants, but it was not raised by the defendant Stevens. He simply said in paragraph 3 of his defence: "This defendant does not admit that the indenture of the 19th February, 1907, is correctly stated or that the same constitutes a valid or effectual mortgage of the trust funds under the said indenture of settlement." He does not admit it was a valid and effectual mortgage. Now, was there any surprise? I think not. The plaintiff was told by the other defendants of this particular objection which we hold to be a fatal objection. Why is it not open to the defendant to raise that defence under paragraph 3 of the defence? But I rather prefer to put the matter higher than that. The transaction is illegal under the Money-lenders Act. That has been decided by this Court, and the authority which was cited by Mr. Terrell,—*Scott* v. *Brown, Doering, McNab & Co.* (1)—to which no reply has been or could be given, is extremely in point on that question. There Lindley L.J., giving the leading judgment, says (2): "Ex turpi causâ non oritur actio. This old and well-known legal maxim is founded in good sense, and expresses a clear and well-recognized legal principle, which is not confined to indictable offences. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not." A. L. Smith L.J. says precisely the same (3): "If a plaintiff cannot maintain his cause of action without shewing, as part of such cause of action, that he has been guilty of illegality, then the Courts will not assist him in his cause of action. This was decided in *Taylor* v. *Chester* (4), where the illegality was pleaded, and also in *Begbie* v. *Phosphate Sewage Co.* (5), where it was not pleaded, but, the fraud being apparent, the Court would not interfere." In the

(1) [1892] 2 Q. B. 724.
(2) Ibid. 728.
(3) [1892] 2 Q. B. 734.
(4) (1869) L. R. 4 Q. B. 309.
(5) (1875) L. R. 10 Q. B. 491.

C. A. 1912

ROBINSON'S SETTLEMENT, *In re.*

GANT *v.* HOBBS.

Cozens-Hardy M.R.

present case it has been established to the satisfaction of the Court, after due notice to the plaintiff, that this security is illegal,—not merely void, but illegal,—and that being so, I think it would be quite preposterous for us to allow the plaintiff to recover against Stevens upon this illegal contract simply on the ground that he has not in terms referred to the Money-lenders Act. In my opinion the appeal succeeds in favour of Stevens as well as in favour of all the other parties. Therefore no amendment is necessary, and the appeal will be allowed and the consequences follow with regard to costs in the usual way. The argument on the construction of the covenant has not been completed, so I need not refer to it.

FLETCHER MOULTON L.J. I am of the same opinion as the Master of the Rolls on both the grounds indicated in his judgment. So far as concerns the illegality of the transaction the matter is too clear to require a word from me.

With regard to the other question, I would point out that these rules are meant to assist the administration of the judicial functions of the Court, and they are not meant to introduce rigid technicalities which would militate against full justice being done by the Court. They are there to protect litigants, and in cases where there is no wrong done, and nobody is taken by surprise or put at a disadvantage thereby, it is perfectly open to the Court either to grant an amendment or to decline to enforce a strict obedience to these rules, more especially in the case of rules to the breach of which no penalty is affixed. In the present case the plaintiff was put to prove the validity of the document. It would have been quite possible for him to have asked on what ground the validity was challenged by the defendant Stevens. He did not do so, possibly because in the pleadings of the other defendants it was clearly challenged on the ground that it was an illegal transaction under the Act. On the hearing it comes out that it was undoubtedly an illegal transaction. To say that the defendant Stevens cannot avail himself of the defence so arising would be to say that not putting it in the pleading was a formal and binding waiver of the point. In this particular case I am of opinion that no formal waiver of the point would be binding

because the transaction was illegal. But even in the case of any other ground of defence the not putting it in the pleadings is not a waiver, although it does prevent the defendant from raising it unless the Court allows him to amend, which it will only do if the raising of it would not be unfair to the other side. Therefore I think that no amendment was necessary, and that this Court is bound to dismiss the action against Stevens just as much as against the other defendants.

BUCKLEY L.J. The remaining question is whether the plaintiff can hold his judgment against Stevens. In my opinion he cannot, and for many reasons. In the first place the point is covered by the judgments given on the former part of the case. The language of s. 2, sub-s. 1 (*c*), of the Money-lenders Act is such as to avoid any agreement in the course of the business as a money-lender with respect to the advance and repayment of money. As between the plaintiff and Stevens, the matter was one of agreement under which Gant was to advance money to Stevens, and others, upon certain terms. The statute, according to its true construction, determined by decisions, has rendered that agreement wholly void. Under those circumstances the plaintiff cannot as against Stevens say that there exists any relation of creditor and debtor. But then it is said Stevens has not pleaded this point Paragraph 3 of his defence is not very plain, so I will assume that he has not done so. The first answer is to be found in Lindley and A. L. Smith L.JJ.'s judgments in *Scott* v. *Brown, Doering, McNab & Co.* (1), of which the Master of the Rolls has already read part. Beyond that it seems to me that Order XIX., r. 15, on which the plaintiff relies as excluding Stevens from setting this up, has not that effect. Order XIX., r. 15, provides that the defendant must by his pleading do various things, but it names no consequence if he does not do those things. It is not confined, as Mr. Cave contended, to a case where a statute is the thing to be pleaded; it applies to all cases of grounds of defence or reply which if not raised would be likely to take the opposite party by

(1) [1892] 2 Q. B. 724.

C. A. 1912

ROBINSON'S SETTLEMENT, *In re.* GANT *v.* HOBBS.

Buckley L.J.

surprise or raise issues of fact not arising out of the pleadings. Where the defendant ought to plead things of that sort the rule does not say that if he does not the Court shall adjudicate upon the matter as if a ground valid in law did not exist which does exist. If in the course of the proceedings it was proved that the deed sued upon was a forgery and the defendant does not plead it or did not know it was a forgery, the Court would not give judgment upon the deed on the footing that it was a valid deed. The effect of the rule is, I think, for reasons of practice and justice and convenience to require the party to tell his opponent what he is coming to the Court to prove. If he does not do that the Court will deal with it in one of two ways. It may say that it is not open to him, that he has not raised it and will not be allowed to rely on it; or it may give him leave to amend by raising it, and protect the other party if necessary by letting the case stand over. The rule is not one that excludes from the consideration of the Court the relevant subject-matter for decision simply on the ground that it is not pleaded. It leaves the party in mercy and the Court will deal with him as is just. Therefore it was open to Stevens, and on that ground I think he succeeds.

Further, I want to say a word on another point which was argued by Mr. Terrell because Mr. Cave has indicated that this case may go further, and if it does, I think the House of Lords are entitled to know our view. The covenant in question is a covenant by Stevens and Hobbs "as such trustees but not otherwise." The language is: "In pursuance of the said agreement and in consideration of the sum of 800*l.* now paid by the mortgagee to the trustees at the request of the said Edward Arthur Robinson testified by his being a party to and executing these presents (the receipt whereof is hereby acknowledged) the trustees as such trustees but not otherwise hereby covenant with the mortgagee to pay him on the 19th day of August next the sum of 800*l.* with interest thereon in the meantime at the rate of 6*l.* per cent. per annum from the date of these presents." On the decision of the House of Lords in *Gordon* v. *Campbell* (1), and the decision in *Muir* v.

(1) 1 Bell, App. 428.

City of Glasgow Bank (1), particularly the language of Lord Cairns (2), this covenant as trustees was I think not a covenant which bound Stevens personally: it was a covenant which bound only the two trustees in respect of the trust fund in their hands at the date of the issue of the writ. In 1907 when this writ was issued there were no funds in their hands. *Gordon* v. *Campbell* (3) was a case in which trustees borrowed, for the purposes of their trust, 7000*l.* and guaranteed heritable bonds over the trust property to secure the loan, and bound themselves "as trustees aforesaid" to make payment of the loan and bound themselves "qua trustees only" to warrant, &c. The House held there was no personal liability on the trustees. In *Muir* v. *City of Glasgow Bank* (1), a case in which the trustees were held liable for reasons which were clearly stated by the House, Lord Cairns put this example (2): "If, for example, A. B., the executor of X., contracted to make a payment as executor of X., and as executor only, to C. D., it would be difficult to suppose that any obligation except an obligation to pay out of assets was intended." In my opinion *Gordon* v. *Campbell* (3) and the language of Lord Cairns in *Muir* v. *City of Glasgow Bank* (2) are applicable and this covenant as trustees is not a covenant that binds Stevens personally.

Appeal allowed.

Solicitors: *Lidiard & Co.*; *Colyer & Colyer*; *Joynson-Hicks, Hunt, Moore & Cardew.*

(1) 4 App. Cas. 337. (2) 4 App. Cas. 355.
(3) 1 Bell, App. 428.

H. C. R.

C. A. 1912

March 11.

In re JANE MORRIS AND MARY MORRIS (Persons of Unsound Mind not so Found by Inquisition).

Practice—Lunatics—Two Sisters of Unsound Mind not so found—Summons as to Property—Separate Summonses—Duplicate Evidence—Consolidation—Costs—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *s.* 116—*Rules in Lunacy*, 1892-1893, *rr.* 42, 48, 55.

Two sisters alleged to be persons of unsound mind not so found by inquisition were detained in an asylum. Each was entitled to a one-third share in a small property; one of them had also a mortgage of 392*l.*, and the other a mortgage of 58*l.* Their sister applied for an order that she should be appointed receiver of their estates and that she might be at liberty to apply their income to their maintenance. For this purpose she took out two summonses in similar terms founded on evidence which had been previously filed. This evidence consisted of affidavits practically in duplicate by the applicant stating the family history and property of the lunatics; duplicate copies of an affidavit of the fitness of the applicant to be receiver; and affidavits by the medical attendant, which differed considerably. Separate undertakings by the applicant to account were also filed. The Master objected to the duplicate evidence and made one order appointing the applicant receiver on both summonses; allowing the whole income to be applied for maintenance; and directing that only such costs should be allowed as would have been incurred if one set of affidavits and one undertaking had been filed in the two matters.

The receiver appealed and asked that separate orders might be made:—

Held, that the Master's order was right. It was necessary to have two summonses in the first instance, but not to have duplicate evidence.

Appeal from an order made by Mr. H. S. Theobald, K.C., Master in Lunacy.

Jane Morris and Mary Morris were sisters alleged to be persons of unsound mind, and the question of practice now in dispute had arisen upon applications to render their property available for their maintenance. Each of them was entitled to a one-third share in a small property, such share being valued at about 20*l.* a year. Mary was also entitled to 392*l.* invested on mortgage at 4 per cent., and Jane to 58*l.* similarly invested. It was proposed to pay the whole of their income, amounting to about 35*l.* and 23*l.* a year respectively, to the Hereford County

and City Asylum, in which they were now detained. Two summonses were issued in November, 1911, under s. 116, sub-s. 1 (*c*), of the Lunacy Act, 1890, asking for the appointment of Ann Morris, their sister, as receiver of their estate and effects respectively, and that she should be at liberty to receive all moneys due to them and let the property and pay outgoings and apply the net income for their maintenance. These summonses were in precisely similar terms, except that one referred to Jane and the other to Mary, and were founded on affidavits which in accordance with the usual practice had been previously filed. This evidence consisted of affidavits by Ann Morris giving the family history and a statement of the property of the alleged lunatics, being practically duplicate copies of the same affidavit with the names altered; duplicate copies of an affidavit of the fitness of Ann Morris; and affidavits of the medical attendant as to mental condition, which of course differed considerably. Separate undertakings by the receiver to account were also filed. When the matter came before the Master he objected to the duplicate evidence and made the following order. "(1.) Upon the certificate of the Masters in Lunacy that she has completed her security the said Ann Morris (hereinafter called the receiver) is authorized in the name and on behalf of the patients respectively to receive and give a discharge for (*a*) the rents and profits including all arrears thereof of the freehold property to which the patients are respectively entitled with power to manage and let the same for any periods not exceeding three years and to pay all proper outgoings in respect thereof. (*b*) All dividends interest and income and all arrears thereof respectively to which the patients respectively are or may become entitled. (2.) As from the date hereof the whole net income of the patients is allowed for their maintenance. (3.) The reasonable and proper costs of the receiver of incident to and consequent upon these applications are to be taxed but only such costs are to be allowed as would have been incurred if one set of affidavits and one undertaking had been filed in the two matters and the application had been made under sec. 116 sub-s. 1 (*c*) of the Lunacy Act 1890 and only one attendance of the solicitors is to be allowed and such costs are to be paid by the receiver in equal moieties

C. A. 1912

MORRIS, *In re.*

out of any moneys of the patients available. (4.) No fee is to be taken in these matters from the date of this order and inclusive thereof."

The receiver appealed and asked that the order might be discharged, and that separate orders, each limited to the estate of one of the lunatics, might be made.

A. B. Marten, for the appellant. We were obliged to issue two summonses, because every summons has to be served on the person alleged to be of unsound mind (r. 48 of the Rules in Lunacy, 1892), together with a notice in Form 8 of the schedule to the Rules. The evidence in support of the summons has to be filed before the summons is issued. The principle is that nobody should be branded as a lunatic without inquiry: Heywood and Massey's Lunacy Practice, 4th ed. p. 565. By r. 42 the Masters may consolidate the proceedings where a simultaneous application is made with reference to two members of the same family, and one set of evidence, intituled in the matter of both patients, may be sufficient; but in practice it has been found very inconvenient. Separate applications and evidence have generally been allowed on taxation: Heywood and Massey's Lunacy Practice, 3rd ed. p. 512. The statement to that effect in the note to r. 42 is omitted in the 4th edition, but we submit that the practice is not altered. In the present case both patients have made wills, and their provisions differ, so that if there is only one order confusion is sure to arise. We could not apply to the Master for advice before the summonses were issued, for the filing of evidence was the first step to be taken, and till the summonses were issued he would have no jurisdiction. By r. 55 the provisions of the Rules as to lunatics so found by inquisition are to apply to these cases, and the proceedings with reference to such lunatics must be kept distinct and separate: *In re Whalley*. (1) We submit that the costs of two sets of evidence should be allowed and that separate orders should be made.

COZENS-HARDY M.R. Mr. Marten has argued this case with great clearness and ability, but I feel no doubt that the course

(1) [1906] 1 Ch. 565.

proposed by the Master was perfectly right. There are two sisters who are said to be, and who have now been treated as being, of unsound mind; there is a third sister who applied for the appointment of herself as receiver to make provision for their maintenance. These three sisters are interested as tenants in common of some small property, and one of the two alleged lunatics has rather a larger income than has the other, derived from some other property. Two separate summonses were issued with great propriety; the applicant could not have got on without them; two summonses were necessary, and accordingly there was a separate summons in each case. Then affidavits, really in duplicate, were filed by the same sister as to the family history and as to the property; duplicate evidence was filed of the fitness of the receiver; and duplicate evidence of the same medical attendant, because these ladies were living under the same circumstances. What the Master has done is this: he has made an order dealing with the income of these two sisters and providing for their maintenance, and says the reasonable and proper costs of the receiver of and incident to and consequent upon these applications are to be taxed, but only such costs are to be allowed as if one set of affidavits and one undertaking had been filed in the two matters and the applications had been made under s. 116, sub-s. 1 (*e*), of the Lunacy Act: "To every person with regard to whom it is proved to the satisfaction of the Judge in Lunacy by the certificate of a Master, or by the report of the Commissioners, or by affidavit or otherwise, that such person is of unsound mind and incapable of managing his affairs, and that his property does not exceed two thousand pounds in value, or that the income thereof does not exceed one hundred pounds per annum." It is said to be, and I have no doubt it is, the practice, and I think the laudable practice, of the Lunacy Office, not to allow a summons to be issued until affidavits have been filed in the matter of the intended proceedings, because it would be rather offensive to allow a summons to be taken out without the slightest foundation suggesting that a person is a lunatic. That is the practice of the Lunacy Office with which I do not wish in the least to interfere. But having started these several proceedings by affidavit, why should not that affidavit be headed In the matter of A. and B., persons

C. A. 1912 — MORRIS, *In re.* — Cozens-Hardy M.R.

of unsound mind, or whatever it may be? I fail to see why not. There is a great deal in the Rules which points to that. Rule 42 of the Rules of 1892 apparently only deals with cases where there has been inquisition, but that says: "The Masters, if it seems to them expedient, may consolidate and carry on together similar proceedings before them in the matters of several persons being members of the same family, and may in any case use in the matter of one member of a family evidence filed in the matter of any other member of the same family." I think these Rules apply mutatis mutandis to applications under s. 116 of the Act of 1890. That seems to me to render it perfectly plain that it was competent to the Master to allow affidavits headed in the matter of the two to be used in the case of each application before him. The Master seems to have dealt with the costs with perfect propriety, and I fail to see that there is any such question of principle as has been alleged by Mr. Marten. It must not be supposed that in all cases this quasi-consolidation ought to be allowed, the Master will judge in each case if it is so or not. There may be two lunatics in the same family I can conceive whose circumstances are entirely different. Then the Master will say they ought to be treated as distinct. In case of difficulty I have no doubt information could be obtained from the Lunacy Office before the summons is issued, or even before the affidavits are sworn if there is any objection to filing common affidavits in the case. In my opinion the order of the Master was quite right, and this appeal must be dismissed.

FLETCHER MOULTON L.J. I agree.

BUCKLEY L.J. It is the practice in the Lunacy Office before issuing a summons under s. 116 to require evidence making a prima facie case of unsoundness of mind. If that was the only difficulty in the applicant's way it could in such a case as this have been easily removed; she could by attending at the office have learnt whether the Master would accept one affidavit intituled in the matter of both these ladies and the Lunacy Act. I have no doubt she would have received an answer in the affirmative. Having done that it would be necessary no doubt to issue two

C. A. 1912 — MORRIS, *In re.* — Buckley L.J.

summonses. Upon reading the one affidavit and the two summonses, the Master would have made an order to consolidate, and have saved a double set of costs. There ought not to have been two affidavits of service; two affidavits of the fitness of the receiver; two affidavits of the medical superintendent; two separate affidavits of fortune; and a separate undertaking in each case. They are largely mere repetition and waste of money. There is an earnest desire in the Lunacy Office to take every possible step to save costs in the cases of these small fortunes. The aggregate annual income of the ladies in this case is 58*l.* 0*s.* 1*d.* I suppose the costs of these applications alone would amount to something like a year's income. I think the Master was quite right.

Solicitors: *Field, Roscoe & Co., for Lambe, Carless & Son, Hereford.*

H. C. R.

MANKS *v.* WHITELEY.

C. A. 1912 — *Feb.* 12, 13, 14, 15; *March* 18.

[1910 M. 2758.]

Mortgage—Priority—Merger—Reconveyance and New Mortgage without Notice of Intermediate Charge—Constructive Notice—Yorkshire Registries Act, 1884 (47 & 48 *Vict. c.* 54)—*Yorkshire Registries Amendment Act*, 1885 (48 & 49 *Vict. c.* 26).

In 1900 O. mortgaged land in Yorkshire to A. to secure 300*l.* and interest, and in 1901 he gave a second mortgage upon the same property to the plaintiff. In 1905 he further charged the property to A. All these securities were registered in the Yorkshire Registry. In 1907 O., without disclosing the plaintiff's mortgage, offered to sell his equity of redemption to the defendant W. for 450*l.* She accepted conditionally upon finding some one to advance 300*l.* to pay off A.'s first mortgage. The defendant W. instructed her solicitor, who introduced the defendant F., who agreed to advance the 300*l.* on first mortgage. In carrying out the transaction W.'s solicitor acted for all parties. He did not investigate the title nor search the register. None of the parties except O. knew of the existence of the plaintiff's second mortgage. F. advanced the 300*l.*, which the solicitor paid to A., from whom he obtained the title deeds. W. then paid off A.'s further charge, and the whole transaction was completed by three contemporaneous deeds: (1.) a

C. A.
1912
MANKS
v.
WHITELEY.

reconveyance by A. to O. freed from A.'s mortgage and further charge; (2.) a conveyance by O. to W.; and (3.) a mortgage by W. to F.:—

Held by Cozens-Hardy M.R. and Buckley L.J. (Fletcher Moulton L.J. dissenting), that, on the reconveyance by A. to O., A.'s mortgage and further charge were not kept alive, and the plaintiff's mortgage became a first charge on the property in priority to those of the defendants F. and W.

Toulmin v. *Steere* (1817) 3 Mer. 210, followed.

The subject of merger of charges considered.

Per Fletcher Moulton L.J.: *Toulmin* v. *Steere* was wrongly decided and ought to be overruled. At any rate the present case did not come within that decision.

Decision of Parker J. [1911] 2 Ch. 448, reversed.

THIS was an appeal from the decision of Parker J. (1)

The question raised upon the appeal was as to the priority of certain mortgages upon a property situated in the county of York and known as the "Lower Brow Farm," the equity of redemption in which, prior to the transactions which gave rise to the question, was vested in Samuel Ogden. The facts of the case are fully stated in the report in the Court below. Shortly stated they were as follows:—

On April 4, 1900, Samuel Ogden mortgaged the Lower Brow Farm to James Ackroyd to secure 300*l.* and interest. On October 16, 1901, Ogden gave a second mortgage upon the property to the plaintiff, Manks, as collateral security for two advances of 120*l.* and 380*l.* respectively which were primarily charged upon other properties belonging to Ogden. Shortly after the giving of this mortgage Manks arranged with Ogden that all payments made by Ogden to Manks should be appropriated to the payment off of the advances of 120*l.* and 380*l.* and not to the payment of interest on other sums owing by Ogden to Manks on the security of the mortgages on the other properties belonging to Ogden. This arrangement continued till August 19, 1905, when it was agreed not only that future payments should be taken on account of interest, but that such past payments as had been appropriated to capital should be reappropriated to interest. In the meantime, on March 25, 1905, Ogden had further charged the Lower Brow Farm to Ackroyd to secure the sum of 172*l.* 8*s.* 11*d.* and interest. All these charges were

(1) [1911] 2 Ch. 448.

respectively registered in the Yorkshire Land Registry at or about the dates when they were effected. In 1907 Ackroyd was pressing Ogden for repayment of what was due on his mortgage and further charge. Ogden, being unable to find the money, offered to sell the property to his daughter, the defendant Louisa Whiteley, for 450*l.*, and she accepted the offer conditionally on being able to find some one to advance the amount required to pay off Ackroyd's first mortgage. She instructed a solicitor named Walshaw, telling him that she had agreed to purchase the property for 450*l.*, that Ackroyd had a mortgage on it for 300*l.* and a small further charge, and that she desired to pay Ackroyd off. Walshaw put the matter before another client of his, the defendant Farrar. Farrar agreed to advance 300*l.* on a first mortgage of the property; and Ogden wrote to Walshaw asking him to get the matter through as quickly as possible. Walshaw, acting on behalf of all parties, then obtained 300*l.* from Farrar, paid it to Ackroyd, and obtained possession of the title deeds relating to the property. He next agreed the amount due to Ackroyd on his further charge at 48*l.* 5*s.* 6*d.*, and this he paid out of his firm's money, being afterwards recouped by the defendant Louisa Whiteley. Walshaw then prepared and obtained the execution of three deeds to carry out the transaction, all of which were duly registered.

By the first of these deeds, dated August 16, 1907, Ackroyd, in consideration of the payment to him of the moneys due to him upon his mortgage and further charge, reconveyed the property to Ogden freed and discharged from the mortgage and further charge. By the second deed, of the same date, Ogden, in consideration of 450*l.*, conveyed the property to Louisa Whiteley. By the third deed, dated the next day, Louisa Whiteley mortgaged the property to Farrar to secure 300*l.* and interest. To this deed Louisa Whiteley's husband was also a party and joined in the personal covenant to repay the 300*l.* In this transaction none of the parties concerned, except Ogden, had any knowledge or notice of Manks' second mortgage on the property. Ogden alleged at the trial that this charge had been paid off, but this was not true. Walshaw did not ask for an abstract of title nor search the register. Having obtained the deeds and the legal

C. A. 1912 — MANKS v. WHITELEY.

estate for Farrar, he thought it unnecessary to search on his behalf, and he was expressly told by Louisa Whiteley and her husband that he need not search so far as they were concerned.

On October 19, 1910, Manks brought this action against Mrs. Whiteley, Ogden, and Farrar for a declaration that on the execution of the reconveyance of August 16, 1907, Ackroyd's mortgages merged in the fee, and the charge given by the deed of October 16, 1901, became a first charge on the property in priority to those of the defendants Farrar and Whiteley.

Parker J. held (1) that Ackroyd's mortgage and further charge had not merged by the transaction of 1907, and that the defendant Farrar was entitled to priority over the plaintiff. Against this decision the plaintiff appealed.

P. O. Lawrence, K.C., and *Richard Watson*, for the appellant. The property in question is situate in Yorkshire and is subject to the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), as amended by the Yorkshire Registries Amendment Act, 1885 (48 & 49 Vict. c. 26). The provision in s. 15 of the former Act, that the registration of any instrument under that Act should be deemed to constitute actual notice of such instrument, and of the fact of registration, to all persons and for all purposes whatsoever as from the date of registration, was repealed by s. 5 of the Act of 1885 on account of the inconvenience it caused to banks. But the provisions for registration continue in force and determine the priorities: s. 14 of the Act of 1884. The appellant's collateral security of October 16, 1901, was registered and Farrar had constructive notice of it. Parker J. has given Farrar priority in respect of a mortgage although on the register it has ceased to exist. Farrar and his solicitor did not search the register nor ask for an abstract, therefore he is affected by notice of the appellant's charge within s. 3, sub-s. 1 (i.), (ii.), of the Conveyancing Act, 1882: *In re Nisbet and Potts' Contract.* (2) It was their duty to search the register: *Kettlewell* v. *Watson* (3); Dart on Vendors and Purchasers, 7th ed. p. 1223. Ackroyd's mortgage was not kept alive and was not intended to be kept

(1) [1911] 2 Ch. 448. (2) [1905] 1 Ch. 391.
(3) (1884) 26 Ch. D. 501.

alive. There was an absolute reconveyance and an extinguishment of the debt; it was not a transfer or equivalent to a transfer. The question to be answered is what was the intention of the parties: *Otter* v. *Lord Vaux* (1); *In re W. Tasker & Sons, Ld.* (2) Ogden's object was to get rid of the debt.

[BUCKLEY L.J. A debtor cannot keep alive his own debt for the purpose of defeating another creditor. The question is whether Mrs. Whiteley and Farrar meant to keep it alive.]

The deeds themselves contradict any intention to keep the mortgage alive. If the parties had desired to do so they might easily have done it: *Thorne* v. *Cann.* (3) The Court only presumes an intention to keep alive where nothing to the contrary is shewn: *Liquidation Estates Purchase Co.* v. *Willoughby.* (4) In the present case there was an actual extinguishment of the debt by the conveyance to Mrs. Whiteley, which recites that the property is free from incumbrances. So the case does not rest on *Toulmin* v. *Steere* (5) alone.

T. H. Carson, K.C., and *J. G. Wood*, for Farrar. Farrar is really in the position of an equitable transferee of Ackroyd's mortgage and has priority over the appellant. The result is the same whether there were two transactions or only one. Even if it was a sub-mortgage Farrar was in the position of Ackroyd. It was not necessary to have a formal transfer, and for our purposes the effect of a transfer is the same as that of a sub-mortgage. There was no intention that Ogden's debt to Ackroyd should merge. Ackroyd and Ogden both became trustees for Farrar and he never consented to any merger of the mortgage debt. Farrar is not estopped by the third deed, for he did not execute it, and it cannot be shewn that he intended to abandon his equitable security. If the appellant is right he will get a first mortgage although he only bargained for a second mortgage; and Farrar, who meant to get a first mortgage, will be postponed to him. There is now no merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity: s. 25, sub-s. 4, of the Judicature Act,

(1) (1856) 2 K. & J. 650; 6 D. M. & G. 638.
(2) [1905] 2 Ch. 587, 604.
(3) [1895] A. C. 11.
(4) [1898] A. C. 321.
(5) 3 Mer. 210.

C. A. 1912 MANKS v. WHITELEY.

1873. Courts of Equity always have regard to the intention of the parties, and in the absence of any direct evidence of intention they presume that merger was not intended if it was to the interest of the party, or even consistent with the duty of the party, that merger should not take place: *Capital and Counties Bank* v. *Rhodes* (1); *Worthington* v. *Morgan* (2); *Crosbie-Hill* v. *Sayer* (3); *Lord Gifford* v. *Lord Fitzhardinge* (4); *Phillips* v. *Gutteridge* (5); *Adams* v. *Angell.* (6) It would be inequitable to give Manks priority over Farrar, and the form of the deeds is immaterial. It was clearly for Farrar's benefit to keep alive the mortgage. The Court will have regard to his intention and interest and not to the form of the deeds or the Registration Acts.

It has been held in *Battison* v. *Hobson* (7) that ss. 7 and 14 of the Act of 1884 give to equitable mortgagees by deposit priority over registered assurances even though they do not register a memorandum of their charge. If an equitable transfer or sub-mortgage is registered the transferee has a corresponding priority. Here the mortgage was registered and the transfer to Farrar is protected by the first words of s. 14. Under the latter part of the section if we have an equitable sub-mortgage or transfer we come before Manks, who claims under Ogden. Registration alters the date, it does not alter the effect of the deed.

We had no notice of Manks' deed; we took every proper precaution, and the Conveyancing Act does not increase the liability to constructive notice. Registration is not notice.

T. J. C. Tomlin, for Mrs. Whiteley. Farrar is entitled to priority over the appellant. The word "merger" is used inaccurately in this case. The question is whether the debt has been extinguished. The onus is on the appellant to shew that with knowledge of the benefit of keeping it alive Mrs. Whiteley intended to extinguish the debt.

[COZENS-HARDY M.R. referred to his judgment in *In re W. Tasker & Sons, Ld.* (8)]

(1) [1903] 1 Ch. 631, 652.
(2) (1849) 16 Sim. 547.
(3) [1908] 1 Ch. 866.
(4) [1899] 2 Ch. 32.
(5) (1859) 4 De G. & J. 531.
(6) (1877) 5 Ch. D. 634.
(7) [1896] 2 Ch. 403.
(8) [1905] 2 Ch. 587, 604.

That was a different case altogether. It was really a case of ultra vires.

[BUCKLEY L.J. How can there be presumption of an intention to keep alive the debt where there is no knowledge of the charge against which protection is necessary?]

If a first mortgage is paid off without knowledge of the existence of a mesne incumbrance there is nevertheless a presumption in favour of the payer that he intended to keep the debt alive, if in fact it is for his benefit to do so: *Burrell* v. *Earl of Egremont.* (1) See also *Gokuldoss Gopaldoss* v. *Rambux Seochand.* (2)

Where the owner of an estate in fee pays off a charge there is a presumption against him that he intends to destroy it, but if there is any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it even if there be no expressed intention to keep it alive: *Adams* v. *Angell.* (3) In that case *Toulmin* v. *Steere* (4) was distinguished. See also *Grice* v. *Shaw* (5) and *Forbes* v. *Moffatt.* (6)

In *Thorne* v. *Cann* (7) Lord Macnaghten says: "Nothing, I think, is better settled than this, that when the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. You may find the intention in the deed, or you may find it in the circumstances attending the transaction, or you may presume an intention from considering whether it is or is not for his benefit that the charge should be kept on foot." The same reasoning was applied in *Liquidation Estates Purchase Co.* v. *Willoughby.* (8)

In *Ingle* v. *Vaughan Jenkins* (9) the principle was applied by Farwell J. to the merger of leases, and he there approved the proposition stated in Lewin on Trusts, 10th ed. p. 889, namely, that "The principle by which the Court is guided is the

(1) (1844) 7 Beav. 205, 232.
(2) (1884) L. R. 11 Ind. Ap. 126.
(3) 5 Ch. D. 634.
(4) 3 Mer. 210.
(5) (1852) 10 Hare, 76.
(6) (1811) 18 Ves. 384, 392.
(7) [1895] A. C. 11, 18.
(8) [1898] A. C. 321.
(9) [1900] 2 Ch. 368.

C. A. 1912 MANKS v. WHITELEY.

intention; and in the absence of express intention, either in the instrument or by parol, the Court looks to the *benefit of the person in whom the two estates become vested.*"

Parker J. in *Crosbie-Hill* v. *Sayer* (1) expresses an opinion which is strongly in favour of Mrs. Whiteley's contention. There he says: "Even in the case of a purchase of an equity of redemption, when the first mortgagee is at the same time paid off and joins in a conveyance of the property to the purchaser, so that questions of merger arise, it will require strong evidence of contrary intention to preclude the Court from holding that the first mortgage debt is still alive for the purpose of protecting the purchaser of the equity of redemption from mesne incumbrances, whether at the time of purchase he knows of such incumbrances or otherwise."

Again, in *Liquidation Estates Purchase Co.* v. *Willoughby*, before the Court of Appeal (2), Lindley L.J. says: "If, indeed, there were some unknown mesne incumbrancer who would be let in as a first incumbrancer if Norton's charge were not treated as subsisting, it may be that, notwithstanding *Toulmin* v. *Steere* (3), it could be so treated. But why? Because in that case the purchaser would not have got what he bargained for, namely, the property free from incumbrances, and it would be manifestly unjust to allow a third party to avail himself of the terms of a deed to which he is a stranger in order to defeat the real intentions of the parties to it. It is on this ground that the Courts have gone a long way, and very properly, to prevent a second or a third incumbrancer from obtaining a priority by a mere accident, and at the expense of other people who never intended to benefit him." That I submit exactly fits this case. Here the second incumbrancer is seeking to take advantage of a pure mistake as to facts and thereby to secure a benefit at the expense of the respondents to this appeal. And Parker J. in *Crosbie-Hill* v. *Sayer* (1) says much the same thing: "It would not, in my opinion, be just to allow the first two defendants, who were not parties to the transaction, to avail themselves of it in order to defeat the real intention of the parties,

(1) [1908] 1 Ch. 866, 877, 879. (2) [1896] 1 Ch. 726, 735.
(3) 3 Mer. 210.

obtaining priority for themselves by a mere accident and at the expense of other people who never intended to benefit them." The same principle is expressed by James L.J. in *Stevens* v. *Mid Hants Ry. Co.* (1) The appellant is no more entitled to come in and take advantage of a mistake than of a fraud.

Again, omission to search the register does not operate as constructive notice. There is no duty to search. With regard to Farrar, even if he was bound to search, it would be only in respect of Ogden's title down to Ackroyd's mortgage and Ackroyd's subsequent title under the mortgage down to the time of the advance of the 300*l.* Such a search would not have revealed the plaintiff's mortgage. No doubt, if Mrs. Whiteley were bound to search, a complete search on her behalf down to August 16, 1907, would have disclosed the plaintiff's charge, but failure to search did not affect her with notice of all that search might have revealed: *Kettlewell* v. *Watson* (2); *Hodgson* v. *Dean* (3); *Wiseman* v. *Westland* (4); *Morecock* v. *Dickins.* (5) Registration of an instrument is not deemed to constitute actual notice thereof. Sect. 15 of the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), which made it so, was repealed the following year by s. 5 of the Act 48 & 49 Vict. c. 26.

Richard Watson in reply.

Cur. adv. vult.

March 18. COZENS-HARDY M.R. This appeal, which has been argued with great ability on both sides, raises a question as to the priority of certain mortgages. Before dealing with the particular facts, it will be convenient to state certain general principles which, in my opinion, must be accepted as law. When a mortgagee receives payment of his debt the legal consequences vary according to the situation of the parties and other circumstances. If the payer is a stranger, and nothing more happens, he stands in the place of the mortgagee, and is equitably entitled to the debt, and can claim to have a transfer of the mortgage. If the payer is himself the mortgagor, the debt cannot be kept alive by him

(1) (1873) L. R. 8 Ch. 1064, 1070.
(2) 26 Ch. D. 501.
(3) (1825) 2 S. & S. 221.
(4) (1826) 1 Y. & J. 117.
(5) (1768) Amb. 678.

C. A. 1912 MANKS v. WHITELEY. Cozens-Hardy M.R.

against his own subsequent incumbrancer: *Otter* v. *Lord Vaux*. (1) The payment off enures for the benefit of the subsequent incumbrancer. If the payer is tenant for life of the mortgaged estate, there is a presumption that he intends to keep the charge alive for his own benefit, whatever the form of the transaction may be: *Burrell* v. *Earl of Egremont*. (2) To rebut this presumption there must be clear evidence of actual intention to merge the charge for the benefit of the inheritance. If the payer is owner in fee of the mortgaged estate, and the debt is not his own debt, the presumption is that he does not intend to keep the charge alive for his own benefit. To rebut this presumption there must be evidence of actual intention to keep it alive. If the owner of the equity of redemption sells the estate, with the concurrence of the mortgagee, the purchaser can keep the charge alive, even though the owner could not. But according to *Toulmin* v. *Steere* (3) there is a presumption that the purchaser does not intend to keep it alive. In *Toulmin* v. *Steere* (3) it was held that the purchaser had constructive notice but no actual notice of the subsequent incumbrance. But I cannot think the decision turned upon that circumstance. Constructive notice was important because it defeated a defence of purchase for value with the legal estate, but otherwise it was of no moment. In every case of purchase the purchaser intends to get the property free from incumbrances, and he takes a covenant, more or less limited, against incumbrances. It might well have been held that these circumstances were sufficient to establish an intention to keep alive a debt which the purchaser is paying off. But *Toulmin* v. *Steere* (3), which was decided by a great judge, Sir William Grant, in 1817, is opposed to this view, and I do not think any Court, short of the House of Lords, ought now to decline to follow it.

There are to be found in the authorities phrases which suggest that the test whether a charge is to be kept alive is simply this: is it for the benefit of the payer that it should be kept alive? I do not think this is correct. It must always be for the benefit of the payer that a charge which might avail against unknown

(1) 2 K. & J. 650; 6 D. M. & G. 638.
(2) 7 Beav. 205.
(3) 3 Mer. 210.

incumbrances should be kept alive, and there would be no place for a presumption depending upon the position of the payer. Nor is it easy, in the absence of any evidence, and in contradiction of the form of the documents, to discover any intention to protect himself against an incumbrance of whose existence he had no knowledge. Unless such intention can be proved at the time when the payment was made, it is irrelevant to say at a future date that he certainly would have kept it alive if he had been aware of the danger. It remains to apply these principles to the facts of the present case.

On April 4, 1900, Ogden mortgaged the Lower Brow Farm to Ackroyd to secure 300*l.* and interest. Ackroyd thus got the legal estate. On October 16, 1901, Ogden gave a charge upon this property, with other property, to the plaintiff Manks. Ogden alleged at the trial that this charge had been paid off, but this was not true. On March 25, 1905, Ogden gave a further charge to Ackroyd. In 1907 Ogden was being pressed by Ackroyd for repayment of what was due on his two securities. Ogden offered to sell the property to his daughter, the defendant Mrs. Whiteley, for 450*l.*, and she agreed to buy if she could find somebody to advance the money required to pay off Ackroyd's 300*l.* mortgage. The defendant Farrar found 300*l.* under circumstances which I must explain hereafter; and the transaction was completed by three deeds, all of which were prepared by Walshaw, who acted as solicitor for Ogden, Mrs. Whiteley, and Farrar. By the first deed, dated August 16, 1907, Ackroyd, in consideration of the payment of all moneys secured by his mortgage and further charge, reconveyed the property to Ogden. By the second deed, also dated August 16, Ogden, in consideration of 450*l.*, conveyed the property to Mrs. Whiteley. By the third deed, dated August 17, 1907, Mrs. Whiteley mortgaged the property to Farrar to secure 300*l.* and interest. Now, so far as the case depends solely upon the effect of those three deeds, I feel no doubt that Ackroyd's charge was not kept alive for the benefit of Farrar. Ackroyd was paid off by Ogden, not by Farrar. If the first and second deeds had been combined in one deed, so that Ogden with the concurrence of Ackroyd conveyed to Mrs. Whiteley, the same result would have followed. Nor does it make any difference

C. A. 1912 — MANKS v. WHITELEY. — Cozens-Hardy M.R.

that all these deeds were part of one transaction. It is, however, contended, and with good reason, that we are entitled to look outside the deeds for the purpose of ascertaining the intention. Now it appears that Walshaw, who was first instructed by Mrs. Whiteley, the intending purchaser, consulted an old client, Farrar, who agreed to find 300*l.* on first mortgage. Ogden urged Walshaw to get the matter through as quickly as possible. Walshaw did not ask for an abstract or investigate the title, nor did he search the Yorkshire Registry. If it be material, I think both Mrs. Whiteley and Farrar had constructive notice of the plaintiff's charge. Walshaw induced Ackroyd to let him have possession of the title deeds on payment of 300*l.*, although Ackroyd was entitled to 348*l.* in respect of his two securities. He obviously wanted the title deeds in order to enable him to prepare the three deeds. The 300*l.* paid to Ackroyd was in fact obtained from Farrar. It is urged that Farrar thus became in equity transferee pro tanto of Ackroyd's mortgage, and that Ackroyd thereupon was trustee of the mortgage debt for Farrar to the extent of 300*l.*, and that nothing has happened to deprive him of this equitable right. I am unable to assent to this. It may be that it would have been a breach of trust if Ackroyd, without any authority from Farrar, had reconveyed to Ogden. But with Farrar's authority, and indeed by Farrar's direction, Ackroyd was entitled to do what he did. Farrar is bound by the acts of his solicitor Walshaw. He accepted the three deeds in the form in which they were drawn by his own solicitor, the effect of which was that, to his knowledge and with his approval, Ogden obtained an absolute release and he (Farrar) obtained a new mortgage with a new covenantor. There never was any bargain between Farrar and Ackroyd for the transfer to Farrar of part of Ackroyd's debt. The 300*l.* was paid to Walshaw as Mrs. Whiteley's solicitor in anticipation of the mortgage which Mrs. Whiteley was to give, and did give, to Farrar. This was the security and the only security for which Farrar bargained. The case of Mrs. Whiteley, who found the balance (48*l.*) due to Ackroyd, is still more difficult to sustain. It can make no difference that it was in the first instance paid by her solicitor Walshaw, who was subsequently put in funds by his client Mrs. Whiteley.

A good deal of argument was addressed to us upon the Yorkshire Registries Act, 1884, but I think it sufficient to say that, even if, which may be open to question, Farrar could have relied upon the doctrine of tacking if the property had been in Lincolnshire, s. 16 of the Act precludes the assertion of any such right.

The case to my mind presents unusual difficulties, and I confess that my opinion has varied from time to time. It is not without hesitation that I differ from the very careful and elaborate judgment of Parker J., and the views expressed by Fletcher Moulton L.J. in the judgment he is about to read, but upon the whole I think the plaintiff should rank first and not second, and that the decree should be altered accordingly.

FLETCHER MOULTON L.J. This appeal has been argued on both sides with great ability and elaboration, and the exact conditions under which certain principles of equity are applicable and their effect when applied have been examined by the counsel in the light of very numerous cases.

To my mind the length of the argument and much of the apparent difficulty of the case have been due to its having been thought necessary to discuss these matters in the abstract, whereas in my opinion the concrete facts of the case lead directly to a conclusion which is in close conformity with what is obviously just and which is not dependent on the answers given to the abstract questions.

I shall therefore begin by setting out all such facts as are necessary for my decision.

The question to be decided relates to the priority of the various charges on a property known as "the Lower Brow Farm." In the year 1900 this property belonged to a man of the name of Ogden, who on April 4, 1900, mortgaged the freehold to James Ackroyd to secure 300*l.* and interest. On October 16, 1901, Ogden charged the property by way of second mortgage to the plaintiff, Manks, as collateral security for two advances of 120*l.* and 380*l.* respectively which were primarily charged upon other properties belonging to Ogden. Shortly after the giving of this mortgage an arrangement was made between Ogden and Manks by which all payments made by Ogden to Manks should be

C. A.
1912
MANKS
v.
WHITELEY.
Fletcher Moulton L.J.

appropriated to the payment off of these advances of 120*l.* and 380*l.*, and not to the payment of interest on other sums owing to Manks by Ogden which were secured by mortgage on other properties belonging to Ogden. This arrangement continued till August 19, 1905, when it was agreed between them not only that future payments should be taken on account of interest, but that these past payments which had been appropriated to capital should be reappropriated to the payment of interest. But in the meantime, on March 25, 1905, Ogden had further charged the Lower Brow Farm in favour of Ackroyd to secure the sum of 172*l.* 8*s.* 11*d.* and interest.

The property was situated in the county of York, and the three charges were respectively registered in the Yorkshire Land Register at or about the dates when they were made.

Accordingly in July, 1907, immediately before the transactions took place to which this case relates, the priorities of the charges on the property were as follows. Ackroyd was the holder of the first mortgage for 300*l.* and interest. The plaintiff Manks came second with a charge for so much of the sums of 120*l.* and 380*l.* as had not been discharged by the payments made by Ogden to him in the interim. The later charge to Ackroyd came third, and was for so much of the 172*l.* 8*s.* 11*d.* as had not been discharged by payments by Ogden to Ackroyd. Next came a charge to Manks for such of the interim payments to him by Ogden as were made prior to August 19, 1905. These payments, as I have said, had originally been appropriated to the payments of the charges of 120*l.* and 380*l.*, but had subsequently by arrangement between the plaintiff Manks and Ogden been reappropriated to interest, but this arrangement being later in date than the second charge to Ackroyd could not affect the position of the latter or the amount or priority of the charge to him. Then Ogden came last of all as the owner of the equity of redemption subject to all the above charges. The exact amount due to the plaintiff Manks on the above-mentioned second mortgage does not appear from the evidence, but, as will be seen presently, the amount due on August 16, 1907, to Ackroyd on his later charge had been reduced by payment from 172*l.* 8*s.* 11*d.* and interest to the sum of 44*l.* 16*s.* 5*d.*

In 1907 Ackroyd was pressing Ogden for repayment, and to enable him to find the money Ogden offered to sell the property to his daughter Louisa Whiteley, one of the defendants. The purchase price was nominally 450*l.*, but Ogden was already in debt to his daughter to an amount which would with the amount of his debts to Ackroyd approximately make up that sum. The proposition, therefore, took the form that the daughter should take the property in return for freeing Ogden from his debts to Ackroyd and forgoing Ogden's debt to herself. Mrs. Whiteley was willing to accept the offer provided that some one could be found to provide the 300*l.* secured by the first mortgage to Ackroyd. Her solicitor, Walshaw, had as a client the defendant Farrar, and proposed the matter to him. Farrar examined the property and agreed to find the 300*l.* on first mortgage. He thereupon gave that sum to his solicitor, Walshaw, who on July 25, 1907, paid it to Ackroyd and took from him the deeds of the property. The date of this payment is fixed by what has been termed the "completion account" and is confirmed by the evidence of Farrar. It therefore preceded the execution of the deeds to which I am about to refer.

I have no hesitation whatever in drawing the conclusion that in handing the 300*l.* to Ackroyd Mr. Walshaw was acting on behalf of his client Farrar (who had only consented to lend the money on first mortgage), and that he took up and thereafter held the deeds on behalf of his client in respect of that advance. The effect of this is that from and after that date Farrar stood in the shoes of Ackroyd, so far as that charge of 300*l.* was concerned, and Ogden was no longer a debtor to Ackroyd in respect of that sum. The essential condition having thus been secured by Farrar finding the 300*l.* on first mortgage, Mrs. Whiteley accepted Ogden's offer, and it only remained to carry out the rest of the transaction.

Considered as a whole that transaction was in its essence a very simple one. Ogden was to give up all his interest in the property to his daughter in return for being freed from his debts to his daughter and to Ackroyd. Ackroyd was to be paid off entirely. This was to be effected now that Farrar had taken the position of first mortgagee for 300*l.* by Mrs. Whiteley (or rather

C. A. 1912 — MANKS v. WHITELEY. — Fletcher Moulton L.J.

Mr. and Mrs. Whiteley) finding the money to pay what remained due upon Ackroyd's charges and giving Farrar their covenant to repay the 300*l.* It was in its nature a transaction entirely between the parties and affected in no way the rights of outsiders. We now come to that which has given rise to all this litigation. Had the transaction been carried out by a single deed to which all were parties purporting to effect their whole intention no question could have arisen. Unfortunately the lawyer employed indulged in what I cannot term otherwise than a piece of stupid ingenuity. No doubt a single deed properly drawn up so as to effect the whole intention of the parties must have been of a somewhat special form requiring care in drafting, and he thought he saw a way of carrying out the transaction which entailed only the use of deeds of common form. He therefore drew up and got the respective parties (excepting Farrar) to execute three several deeds, namely, one to which Ackroyd and Ogden were the parties, which purported to reconvey to Ogden the rights which Ackroyd possessed in return for the payment by Ogden of the whole of the sums due on the two charges, secondly, one which purported to convey the property (free from Ackroyd's charges) to Mrs. Whiteley, and thirdly, a mortgage by Mrs. Whiteley, as beneficial owner of the whole property, to Farrar to secure the 300*l.* To this deed Mr. Whiteley was also a party and joined in the personal covenant to repay the 300*l.* This last deed was never executed by Farrar, but was of course handed to him after execution by Mrs. Whiteley. All these three deeds were executed at the same time and beyond question were component parts of a single transaction.

The trouble which has arisen through this mode of carrying out the transaction is as follows. None of the parties, excepting Ogden, knew of the existence of Manks' second mortgage. Ogden excuses his not having told them of it by asserting that he thought that it had been discharged out of certain insurance moneys which came into Manks' hands, but it is admitted that this was not the case. Manks now contends in this action that by the first of the above deeds the interest of Ackroyd, who was first and third mortgagee, was conveyed to Ogden and became merged in the equity of redemption, and that therefore his charge

becomes the first charge on the property and takes priority over the charge to Farrar for 300*l.*, and over what is left of the third charge to Ackroyd, the beneficial interest in which passed to Mrs. Whiteley.

A more unmeritorious claim it is impossible to imagine. The transaction was one which in its entirety could give neither in law nor in equity any additional rights to Manks, nor had he in justice any claim whatever to benefit by it. But he seeks to establish his claim by selecting one of the deeds by which the transaction was carried out and claiming a right to treat it as if it were an independent and separate transaction which must be assumed to have taken full effect before anything further was done, an assumption which is absolutely contrary to the reality of the matter. He then contends that his charge is entitled to priority on the principle of certain cases which he contends lay down that the owner of an equity of redemption who has acquired the interest of his first mortgagee by payment of the mortgage debt may not set up as against the second mortgagee that debt which he has thus paid off. In my opinion this ingenious contention which aims at obtaining for the plaintiff a wholly unmerited advantage is unsound both in fact and law.

To my mind the true position of the Lower Brow Farm at the time that these deeds were being drafted and executed was that Farrar was first mortgagee in respect of the 300*l.* advanced by him, and had been so ever since the payment of the 300*l.* on July 25. I confess that this appears to me to be incontestable. The evidence shews that he only agreed to advance the 300*l.* on first mortgage, that this was known to all the parties, that he paid the money for the purpose to Mr. Walshaw, who was his own solicitor, and that Mr. Walshaw himself paid it direct to Ackroyd and "took up the deeds" which Ackroyd held in virtue of the first mortgage for that sum. I can imagine no plainer or more unmistakable transaction. The money had been paid to Mr. Walshaw to be put on the property on first mortgage, and any other interpretation of the transaction imputes an act of professional misbehaviour to him which was not suggested in cross-examination in the Court below and which we ought therefore not to permit to be made here upon no evidence whatever. By

C. A. 1912 — MANKS v. WHITELEY. — Fletcher Moulton L.J.

virtue of this transaction the first charge for 300*l.* which Ackroyd had previously possessed passed to Farrar. This being so, the position of Farrar necessarily remained unchanged by the reconveyance by Ackroyd to Ogden. It is perfectly true that the words purport to convey the land in fee simple to Samuel Ogden, but the deed did not and could not do that, because there was an outstanding first charge of 300*l.* in Farrar. The consequence is that Samuel Ogden never became under that deed the owner of the whole of the interest of Ackroyd, but only of such portion of it as had not passed to Farrar.

Counsel for the appellant attempted to raise a difficulty as to the legal effect of the transaction with Farrar on the ground that the payment which was made to Ackroyd on his account was only 300*l.*, which was the principal sum due on the mortgage, whereas by the completion account it appears that at that date a small sum of 3*l.* 14*s.* 3*d.* was due on account of interest from April 4 to July 25. It was suggested therefore that this prevented Farrar from obtaining the position of first mortgagee. I am ashamed of having to notice so trumpery a point, but it illustrates the type of technicalities by which the appellant seeks to inflict what to my mind is substantial injustice on the respondents. There is no substance whatever in the objection. By the mortgage deed the interest was payable half-yearly on April 4 and October 4. It had been duly paid up to the preceding April. There was therefore no interest due and payable at the date when Farrar paid the 300*l.*, and I have no doubt whatever that the true effect of the transaction was that he became first mortgagee in the place of Ackroyd, but that to the extent of the apportioned interest to the date of the payment he would be trustee for Ackroyd, and on receiving the half-year's interest on the next October 4 must have paid it over to Ackroyd if Ackroyd had not received it direct from Ogden. As a matter of fact Ackroyd received it in account on August 16, so that the point (which concerned nobody but the parties themselves) never arose. But even if we do not take this obvious and natural interpretation of the transaction and seek out some highly technical explanation the ultimate result will be the same. The position of Farrar

cannot be less favourable than if we take the transaction to be that Ackroyd gave to him a charge of 300*l.* on his own first charge of 300*l.* plus the interest that had accrued but had not become payable, or that the parties agreed that Ackroyd's first mortgage should be turned into a contributory mortgage in which Farrar owned 300*l.* and Ackroyd 3*l.* 14*s.* 3*d.* These and all other possible interpretations of the transactions which are consistent with the facts leave Farrar with an outstanding charge for 300*l.*, either directly as a first charge on the property or indirectly as a first charge on the interest of the first mortgagee, and therefore make it impossible that any deed between Ogden and Ackroyd could pass to Ogden the whole of the interest that Ackroyd originally had or affect in any way the priority of Farrar's charge.

The transaction with Farrar illustrates how important it is to consider the facts of this case and not to discuss in the abstract the principles of equity which it is suggested are applicable to it. The greater part of the argument was devoted to the question whether Ogden could keep alive the charge of his first mortgagee after paying off the first mortgage and getting a reconveyance of the estate, and if he could do so whether it was incumbent on the defendants to shew an intention on his part so to keep it alive. But in my opinion there is no question of whether or not Ogden could by virtue of an intention so to do keep alive such an interest, or whether he had or expressed such an intention. Under the circumstances of this case it remained alive whether he intended it or not, because it was in the hands of Farrar and never passed to Ogden. The consequence is that in spite of the absolute language of the reconveyance this is not a case in which the owner of the equity of redemption in fact acquired the interest of the first mortgagee by the payment off of a mortgage debt and a reconveyance of the estate. In my opinion this suffices to decide the main point at issue. Ogden conveyed all that he had got to his daughter, but he could not convey that which he did not possess, namely, the outstanding first charge to Farrar. Mrs. Whiteley purported to mortgage the property to Farrar as beneficial owner, but in fact she was only beneficial owner subject to this charge. But inasmuch as that charge was

C. A. 1912 — MANKS v. WHITELEY. — Fletcher Moulton L.J.

already in Farrar's hands the defect in her title was of no importance. The effect of the execution of that deed by Mrs. Whiteley and her husband was, and was intended to be, that Farrar obtained their personal covenant to pay the 300*l.* But none of these things either was meant to take away his position as owner of the first charge for 300*l.* or operated in law to deprive him of it.

But the above is not the only answer to the plaintiff's claim. It is in my opinion bad on grounds of much more general application, and I shall proceed to examine them.

The perverse ingenuity of the lawyer led him to carry out the transaction between the parties by three deeds instead of doing it, as he might have done, by one single deed. But these deeds were all executed at the same time. There is not the slightest evidence as to which was physically executed first, and if the appellant's contention rests on the hypothesis that the reconveyance by Ackroyd was executed earlier in time than the other two deeds, he has not proved his case. For all we know the conveyance by Ogden to his daughter may have been first executed, and upon the subsequent execution of the reconveyance from Ackroyd the interest acquired by Ogden thereunder would at once pass to his daughter and not rest in him, so that he never would have become the owner of the interest of the first mortgagee. I say this not for the purpose of raising the contention that this was the order in which the deeds were executed, for there is no more evidence that they were executed in this order than in any other, or in fact that any one of them was completely executed before the execution of any other. But I say it to emphasize the principle that where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all the others being executed also and is intended to speak only as part of the one transaction, and if one is seeking to make equities apply to the parties they must be equities arising out of the transaction as a whole. It is not open to third parties to treat each one of them as a deed representing a separate and independent transaction for the purpose of claiming rights which would

only accrue to them if the transaction represented by the selected deed was operative separately. In other words, the principles of equity deal with the substance of things, which in such a case is the whole transaction, and not with unrealities such as the hypothetical operation of one of the deeds by itself without the others. Now it is quite clear that in the present case the whole transaction was a substitution of Farrar for Ackroyd as first mortgagee for 300*l.*, and Mrs. Whiteley (or Mrs. Whiteley and her husband) for Ackroyd as owner of the further charge to which he was entitled, and of Mrs. Whiteley for Ogden as owner of the equity of redemption, and by such a redistribution of interests the position of the appellant could not be altered in any way either for better or worse.

This conclusion may be arrived at in another way which is more in accordance with the lines of the argument presented to us. The appellant contended that there was a strict rule in equity (enunciated in the case of *Otter* v. *Lord Vaux* (1)) that if the owner of an estate who has mortgaged it to a first and second mortgagee pays off the mortgage debt to the first mortgagee and obtains a reconveyance, the second mortgage becomes a first charge because he cannot set up his own debt which he has paid off against his own creditor the second mortgagee. I shall examine later on the cases on which this doctrine rests, but I wish to point out in limine that in order that this principle may apply the mortgagor must have become the beneficial owner of the interest of the first mortgagee. That is both necessary and sufficient. The principle is applicable even though the reconveyance may be to a trustee for him if he is the beneficial owner. But no one would say that it would be applicable if it could be shewn that the reconveyance to the owner of the equity of redemption was to him as a trustee for a third party, so that beneficially the interest of the first mortgagee passed to his cestui que trust, though nominally the reconveyance was to him. It is evident that the very root and reason of the equity would be absent in such a case. In setting up the charge he would not be setting up his own debt which he had paid off, but he would be setting up that which beneficially belonged to a third person

(1) 2 K. & J. 650; 6 D. M. & G. 638.

C. A. 1912 — MANKS v. WHITELEY. — Fletcher Moulton L. J.

and therefore could equitably be set up against the claims of the second mortgagee. Therefore we must ascertain whether the owner of the equity of redemption becomes the beneficial owner of the interest of the first mortgagee before we can learn whether the equity is applicable.

I have referred to the case where the owner of the equity of redemption takes a transfer to himself as trustee for a third person. But exactly the same conclusions would follow if it were conveyed to him not beneficially but for defined purposes only, as for instance where he was to be a mere conduit pipe by which it was to pass to those persons who were to become its beneficial owners. The test is whether without a breach of contract or a breach of faith he could deal with the property as his own. If he can treat it as his own without breach of contract or faith, then equity will prevent his using it so as to put himself in a position of advantage as contrasted with his second mortgagee. But if he cannot treat it as his own without a breach of contract or of faith, equity will not interfere with him. To do so would be to make him treat it as being his own, that is to say, to hold him bound to commit such a breach of contract or of faith, and against such a doctrine one's intellect and conscience alike revolt.

If I am right in this delimitation of the equity its application to the present case is clear. These deeds, as I have said, form part of one transaction and were executed each on the faith of the other two being executed. Even assuming that there was a reconveyance to Ogden of the whole of the interest of the first mortgagee, it is clear that Ogden would have been committing the grossest breach of faith if instead of transferring it to his daughter for the purpose of Farrar's mortgage he had proceeded to treat himself as the beneficial owner of it. Similarly if the deed really conveyed the fee simple to her from her father she would have been committing the grossest breach of faith if she had proceeded to deal with it as property beneficially owned by her without regard to Farrar. The proposed equity therefore applies in neither of these cases. Those who purported to acquire property by either of these two deeds did so only for the purposes of the entire transaction and not as beneficial owners.

I do not think it necessary to deal with the suggestion that the defendants are bound by the recitals and language of the deeds and that the appellant can avail himself of them for this purpose. Deeds create estoppels between the parties only and no outsider can avail himself of them.

Before examining the authorities which were cited in support of the contentions of the parties in this case, it is desirable to dispose of that portion of the argument that depends on the existence of the Yorkshire Register. It was contended on behalf of the appellant that Farrar and Mrs. Whiteley were bound to examine the register, and that not having done so they must be taken to have constructive notice of all that they would have found there had they in fact searched it, and that therefore they must both be taken to have had constructive notice of the charge on the property to Manks.

So far as Farrar is concerned no question as to the effect of the entries in the register can in my opinion arise. He deduces his title from that of Ackroyd, whose charge he paid off, taking over the deeds. Even if he had a duty to search the register it would only be in respect of Ogden's title down to Ackroyd's mortgage and Ackroyd's title under the mortgage afterwards down to the date of his payment of the 300*l.* to him. The register would have disclosed nothing on such a search, therefore no constructive notice can be attributed to him by reason of his not having in fact searched it. With regard to Mrs. Whiteley the case is different. She was taking over the equity of redemption, and therefore the search on her behalf—if obligatory at all—should have been a complete search down to August 16, 1907, and would have disclosed the charge to Manks. But upon the decisions it is clear that as purchaser she was under no obligation to search the register under the penalty of being affected with notice of all that such a search would have disclosed. In *Morecock* v. *Dickins* (1), in 1768, Lord Camden recognized this as a rule already well established and refused to alter it. This rule has been followed ever since: see *Hodgson* v. *Dean* (2); *Wiseman* v. *Westland*. (3) Of course if a purchaser has

(1) Amb. 678. (2) 2 S. & S. 221.

(3) 1 Y. & J. 117.

C. A. 1912 — MANKS v. WHITELEY. — Fletcher Moulton L.J.

This does not seem to me to be in accordance with the aims or principles of equity, and I am of opinion therefore that *Toulmin* v. *Steere* (1) was wrongly decided. Doubt has been thrown upon it by most eminent judges and in all Courts, and indeed it has scarcely ever been referred to without some marks of disapproval. In my opinion it would have been much better that it should have been formally reconsidered years ago and overruled. The effect of the decision has only been to confuse the Courts in dealing with the equities which arise when there is formally a possibility of merger either in estates or in charges.

Putting aside therefore the decision in *Toulmin* v. *Steere* (1), the current of cases is in favour of the doctrine that, excepting in such cases as are represented by *Otter* v. *Lord Vaux* (2), the rule is that which is enunciated by Parker J. in his judgment in this case as follows (3): "If the benefit of a charge on property and the property subject to the charge vest in the same person, then, as a general rule, equity will treat the charge as kept alive or merged according to whether it be of advantage or of no advantage to the person in whom the two interests are vested that the charge should be kept alive. But in either case clear proof of intention to the contrary will displace the general rule."

The most striking example of this is to be found in such cases as *Burrell* v. *Earl of Egremont* (4) where a life tenant pays off an incumbrance on the property. It is presumed that he does not intend to free the inheritance because it is not to his advantage so to do, and unless there is positive evidence that the intention was to do so the charge on the inheritance is supposed to be kept alive for his benefit. The same principle was applied by Knight Bruce and Turner L.JJ. in the case of *Phillips* v. *Gutteridge* (5), and in the case of estates (which are governed by the same rule as charges) by the Court of Appeal in the case of *Capital and Counties Bank* v. *Rhodes* (6), approving of the decision of Farwell J. in *Ingle* v. *Vaughan Jenkins*. (7) But the two most important authorities in this respect are two cases in the House

(1) 3 Mer. 210.
(2) 2 K. & J. 650; 6 D. M. & G. 638.
(3) [1911] 2 Ch. 458.
(4) 7 Beav. 205.
(5) 4 De G. & J. 531.
(6) [1903] 1 Ch. 631.
(7) [1900] 2 Ch. 368.

of Lords, *Thorne* v. *Cann* (1) and *Liquidation Estates Purchase Co.* v. *Willoughby* (2), which will need separate consideration.

In *Thorne* v. *Cann* (1) the facts were somewhat complicated, but so far as they affect the present case they may be stated as follows. Searle purchased the equity of redemption of some freehold hereditaments from the trustee in bankruptcy of Piller. Piller had previously mortgaged the land to a Miss Arnold for 1000*l.*, and subsequently to Forwood. Miss Arnold wished to be paid off, and accordingly Searle obtained 1000*l.* from his bank and paid her off, taking the deeds and depositing them in his own name at the bank. A month or two afterwards Cann took an assignment of the security thus held by the bank to secure an advance of 900*l.* made by him to Searle. It was contended that the security had been merged in the equity of redemption when Searle paid off Miss Arnold. But their Lordships held that it was not so. In his speech Lord Macnaghten says (3): "Nothing, I think, is better settled than this, that when the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. You may find the intention in the deed, or you may find it in the circumstances attending the transaction, or you may presume an intention from considering whether it is or is not for his benefit that the charge should be kept on foot."

In that case their Lordships were of opinion that the intention that the charge should be kept alive might be inferred from the deed by which Miss Arnold transferred her interest to Searle. But they also thought that the circumstances of the transaction shewed that intention. Lord Macnaghten pointed out that the dealings with the bank and the negotiations with Cann commenced before Miss Arnold was paid off, and added: "These dealings and transactions would have been simply a fraud on the part of Searle if it had not been his intention to keep the charge alive."

In the present case the negotiations with Farrar and the

(1) [1895] A. C. 11. (2) [1898] A. C. 321.
(3) [1895] A. C. 18, 19.

C. A. 1912

MANKS v. WHITELEY.

Fletcher Moulton L.J.

advance by him took place more than three weeks before the execution of the deeds of August 16, and they would have merited in an even stronger degree to be stigmatized as "simply a fraud" on the part of Ogden and Mrs. Whiteley if it had not been their intention to keep the charge alive.

The facts in *Liquidation Estates Purchase Co.* v. *Willoughby* (1) were also complicated. Norton was the owner of a charge for 6200*l.* upon a sum of 12,000*l.* which was the share to which Kennedy was entitled in certain funds. He duly gave notice of this charge to the trustee who held these funds. Notwithstanding this notice the trustee paid 5122*l.* direct to Kennedy and also conveyed to him property worth 5000*l.* on account of his share. Lord Windsor then took from Kennedy an assignment of what was due to Kennedy out of the funds. Subsequently the Liquidation Estates Purchase Company acquired the interests of both Norton and Lord Windsor. It is clear that these payments direct to Kennedy could not prejudice Norton's charge, which remained wholly unsatisfied. Those interested in sharing the funds subject to the original charge to Kennedy contended, however, that Norton's charge on being acquired by the company who owned Lord Windsor's interest became merged in it, so that the total amount for which the funds were liable in respect of Kennedy's charge was only the 12,000*l.* of the original charge to him. But the House of Lords decided against this contention. In other words they held that the two properties, Norton's charge and Lord Windsor's charge, were independent claims and could be enforced separately. Here the wrongful payments to Kennedy operated much as an intermediate charge would have operated. They were good as against Lord Windsor but not as against Norton. The House of Lords held that there was no merger, and Lord Herschell and Lord Macnaghten shew clearly that it sufficed for that purpose that it was against the interest of the purchaser that there should be any such merger. Lord Herschell says (2): "If it were necessary to hold that Norton's right was kept alive under the conveyance of 1893, there appears to me ample reason for so holding, inasmuch as it would be obviously for the benefit of the appellant company to keep alive

(1) [1898] A. C. 321. (2) [1898] A. C. 335.

Norton's interest, so that they might not be affected by any transactions of Kennedy subsequent to his assignment to Norton, and prior to his assignment to Lord Windsor." In this case the House of Lords was reversing the decision of the majority of the Court of Appeal on certain grounds special to that case. But on the general question which concerns us here the judgment of the majority of the Court of Appeal was left untouched, and two passages in that judgment (which was read by Lindley L.J.) seem to me to have an important bearing on the present case. He says (1): "If, indeed, there were some unknown incumbrancer who would be let in as a first incumbrancer if Norton's charge were not treated as subsisting, it may be that, notwithstanding *Toulmin* v. *Steere* (2), it could be so treated. But why? Because in that case the purchaser would not have got what he bargained for, namely, the property free from incumbrances, and it would be manifestly unjust to allow a third party to avail himself of the terms of a deed to which he is a stranger in order to defeat the real intentions of the parties to it. It is on this ground that the Courts have gone a long way, and very properly, to prevent a second or third incumbrancer from obtaining a priority by a mere accident, and at the expense of other people who never intended to benefit him." It would be difficult, in my opinion, to find language which more aptly describes that which the appellant is seeking to do in this case. In another passage he says that having regard to the decision in *Thorne* v. *Cann* (3), in a case where a purchaser of an estate pays off a charge on it without shewing an intention to keep it alive, it is perhaps safe to say (4), "If its continuance as an existing charge is beneficial to him, it will be treated in equity as subsisting, unless an intention to the contrary can be inferred from the terms of the purchase deed or from other legitimate evidence."

These and many other decisions leave no doubt in my mind that the Court will not permit the doctrine of merger to be applied where it would do injustice. At the same time they illustrate forcibly the mischief done by a wrong decision. Although judges in the cases which bear on this question do not conceal their

(1) [1896] 1 Ch. 735.
(2) 3 Mer. 210.
(3) [1895] A. C. 11.
(4) [1896] 1 Ch. 734.

C. A. 1912 MANKS v. WHITELEY. Fletcher Moulton L.J.

disapprobation of the decision of *Toulmin* v. *Steere* (1), their natural desire not to overrule a decision, except in a case where they must choose between doing so and working injustice, has led them to seize on special features in the various cases which have enabled them to come to the right conclusions without formally overruling it. The consequence has been that the real basis of the principle and its proper formulation do not so clearly appear from the language of the decisions as would otherwise be the case. In my opinion Parker J. in his decision in this case and in the case of *Crosbie-Hill* v. *Sayer* (2) has correctly indicated both the origin and the limits of the principle. At common law the merger of estates took place by operation of law without regard to the injustice caused thereby. Equity interfered both with regard to the merger of interests which were recognized by common law and those which are equally real but were at that date recognized only by equity itself. That estates and interests in estates which were quite distinct and could exist in separate hands should mutually destroy one another wholly or partially when they came into the same hands was absurd and unjust when that destruction affected substance and not merely form. Its operation was to lessen the beneficial interest of the owner and thereby to make a gift of a portion of it to some third person. Equity set itself to remedy this anomaly. It never presumes in favour of a gift. If the intention to give exists and the gift is completed it will recognize it, but it requires the intention to be proved, and the onus of proving it rests on the party who claims under it. It applied this simple and equitable principle to merger and it did nothing more. This appears to me to reconcile all the cases. The test whether the merger is or is not beneficial to the owner of the interests is merely another form of saying whether or not it would in substance be a gift to the third party who has given no consideration for the advantage he gains thereby. If that is so the third party must prove the intention to give. Such cases as *Otter* v. *Lord Vaux* (3) do not militate against this principle. Equity does not regard the man who is merely performing his

(1) 3 Mer. 210.
(2) [1908] 1 Ch. 866.
(3) 2 K. & J. 650; 6 D. M. & G. 638.

own obligation and thus removing the charge which was created to secure that performance as making a gift to his other creditors. So far as I know this principle, which I consider to be sound, will reconcile all the decisions except those which stand or fall with *Toulmin* v. *Steere* (1), which I hold to have been wrongly decided, and it gets rid of the crowning absurdity of all, which is exemplified in the present case, namely, that a man is in greater danger from an equitable charge of which he has no notice than from one of which he has notice, because he can have had no conscious intention with regard to the former, seeing that he did not know of its existence. Applied to the present case this principle leaves no doubt as to the right conclusion. In the first place merger would operate as a gift to the appellant as far as regards the first charge of 300*l.* That charge stood before all the charges to the appellant. It would also operate as a gift to the appellant in so far as it would put the later charge of Ackroyd (which was acquired by Mrs. Whiteley) behind that charge to the plaintiff which depended on the reappropriation of past payments to interest instead of capital. There is not the slightest evidence of any intention to make these gifts. The parties interested did not even know of the existence of the charges which they would thus prefer. I am therefore of opinion that merger is not established with regard to either of these charges, and that the judgment of Parker J. is right on all points, and that this appeal should be dismissed with costs.

BUCKLEY L.J. In July, 1907, Ackroyd held the first mortgage of April 4, 1900, for 300*l.* on the Lower Brow Farm property, and a further charge of March 25, 1905, on the same property. The amount due on the latter had at that time been reduced to a sum of about 48*l.* On July 13, 1907, Ogden, the mortgagor, wrote to Walshaw, his solicitor, sending him a notice which Ackroyd had served requiring repayment, and asking Walshaw to get the affair settled as soon as he could. Ogden had arranged with his daughter Louisa Whiteley to sell the property to her for 450*l.* To enable her to carry out that purchase she wanted to find some one to advance 300*l.* to pay off Ackroyd's first mortgage.

(1) 3 Mer. 210.

C. A. 1912 MANKS v. WHITELEY. Buckley L.J.

In this state of things Mr. and Mrs. Whiteley instructed the same solicitor, Walshaw. He had already for years acted for Farrar. In that which followed Walshaw was acting for all the following parties, namely, Ogden, Mr. and Mrs. Whiteley, and Farrar. On July 25, 1907, the amounts due to Ackroyd were 303*l.* 14*s.* 3*d.* on the first mortgage and 44*l.* 16*s.* 5*d.* on the second charge. Walshaw obtained 300*l.* from Farrar, paid it to Ackroyd, and obtained the deeds. Upon Walshaw's evidence it is not, I think, at all clear that in obtaining the deeds he obtained them otherwise than by way of loan from Ackroyd in order to enable him to prepare the necessary instruments to carry out the arrangement. At any rate Ackroyd had not received what was due to him. There was a balance of 3*l.* 14*s.* 3*d.* on the first mortgage and a balance of 44*l.* 16*s.* 5*d.* on the second charge which had not been paid and for which he was still entitled to hold the deeds. The transaction was certainly not one of equitable transfer of Ackroyd's rights as mortgagee. It is not established that in paying the 300*l.* to Ackroyd Walshaw was acting for Farrar. The better view, I think, is that Mrs. Whiteley was borrowing the money from Farrar on the terms that she should give him a first mortgage for it upon the property, and that when Walshaw handed the money to Ackroyd he was acting for Mrs. Whiteley. If so, the case is plain. I will, however, for the purpose of the rest of this judgment assume that Walshaw in paying Ackroyd was acting for Farrar. Upon this hypothesis Farrar, no doubt, who paid the money, would as between himself and Ackroyd be entitled to possession of the deeds as security for the 300*l.* The true effect of the transaction, I think, then was that Ackroyd remained as against the land the mortgagee, and Farrar as between himself and Ackroyd became sub-mortgagee of the whole debt owing to Ackroyd, but by way of security for 300*l.* only.

So far as the instruments which the parties executed are concerned there is no room for doubt as to the transaction. Walshaw agreed with Dewhurst, Ackroyd's solicitor, the amount of the arrears of interest upon the 300*l.* and of the balance due in respect of the further charge. Walshaw paid that amount, and thereupon Ackroyd by the deed of August 16, 1907, reconveyed the property

to Ogden freed and discharged from all principal moneys and interest secured by the deeds of April 4, 1900, and March 25, 1905. By deed of even date Ogden conveyed to Mrs. Whiteley by an instrument which recited that Ogden was seised in fee free from incumbrances, and Mrs. Whiteley and her husband mortgaged to Farrar by a deed dated August 17 which recited that the wife was seised in fee free from incumbrances and as beneficial owner conveyed the land to Farrar in fee by way of mortgage, Mrs. Whiteley and her husband jointly and severally covenanting with Farrar to pay 300*l.* In such a transaction as this the word "merger," although frequently used in the cases, is not a strictly accurate expression. The debt of 300*l.* owing from Ogden to Ackroyd cannot merge in a debt of 300*l.* owing from Whiteley to Farrar. When the owner of a term acquires the reversion in fee the term merges because its continued existence is impossible. Under the altered circumstances the term is swallowed by the reversion. No such state of facts arises in a case of the present kind. The question is not whether the one debt and charge merges in the other debt and charge, but whether the former debt and charge are extinguished and a new debt and charge created in their stead. The mere fact that a new debt is created does not shew that the old debt is destroyed. But the fact that a new debt is created is material in determining upon the whole transaction whether the old debt is kept alive or not. The question here is, I think, whether the defendants or any of them can say that the debt and security of April 4, 1900, which unquestionably are gone at law, are in equity kept alive to protect Mrs. Whiteley or Farrar or either of them against the plaintiff's incumbrance of October 16, 1901.

Where a charge upon a settled estate is paid off by the tenant for life it is presumed that his intention is to keep the charge alive to protect himself against any subsequent incumbrance which may exist, whether he knows of it or not. It is not necessary that he should declare his intention to keep the charge alive. It is for his benefit that it should be kept alive against subsequent incumbrances, if any, and equity therefore presumes an intention on his part so to do. But if the remainderman in fee or in tail pays off the charge the presumption is the other way.

C. A 1912 MANKS v. WHITELEY. Buckley L.J.

If the remainderman declares his intention to keep the charge alive and the debt is not his own debt he can keep it alive, but if he does not so declare the charge is gone. The argument we have heard has been concerned to establish that this is only true if he knows of the subsequent incumbrance. It is said that if he does not know of it, it must be presumed in the absence of evidence of intention that he intended to keep the charge alive against subsequent incumbrances, if any, of which he had not knowledge. I know of no authority to that effect, and in principle it seems to me to be wrong. If he does not declare an intention the presumption is that he does not intend to keep the charge alive when he does know of the subsequent incumbrance. Why should absence of knowledge raise the presumption when ex hypothesi no reason for the intention exists? Where the remainderman pays off the charge it is necessary that he should declare his intention. It is impossible to predicate affirmatively or actively an intention to protect himself against a charge of which upon the hypothesis he had no knowledge. In *Burrell* v. *Earl of Egremont* (1) Lord Langdale (who was dealing with the case of a tenant for life) puts the hypothetical case of its being necessary to shew intention otherwise than by legal presumption and says "the plaintiffs could not have proved that he intended to continue a charge, the existence of which, as a primary charge, was unknown." Where as in the case of the tenant for life the intention is to be presumed, the case is totally different from that of the remainderman where the intention has to be proved. In the former case knowledge is not, in the latter knowledge is, as it seems to me, a necessary factor in determining whether the intention to keep the charge alive exists or not. The principles applicable to the case of a purchaser are not, I think, those applicable to the case of a tenant for life. Upon the authorities they are rather those applicable to the case of a remainderman. *Toulmin* v. *Steere* (2) must, I think, be reviewed, if at all, in the House of Lords. In this Court it must be accepted as being the law.

As matter of fact the way in which this transaction was carried out (a matter which I agree in itself does not determine

(1) 7 Beav. 205, 232. (2) 3 Mer. 210.

the question) plainly establishes, I think, upon the question of intention that all parties intended to do that which in fact the deeds did. It was intended that Ogden should cease to be liable to Ackroyd (a fact which is, I agree, not alone sufficient, for the debt might have been preserved against the land while the personal liability of the mortgagor was released). But not only was Ogden's personal liability to be destroyed, but the debt itself as against the land was to be destroyed also. Farrar, who by paying the 300*l.* had obtained such rights as sub-mortgagee as I have stated, and Mrs. Whiteley, who as to the balance of what was due to Ackroyd presumably became in a position similar to that of Farrar as regards that security, gave up those rights, and Farrar accepted a new mortgage debt and a new security as bought with his money, and Mrs. Whiteley accepted the equity of redemption subject to Farrar's debt as that which was bought with the 48*l.* and the balance of the purchase-money.

A contention has been adduced, and it is I think that upon which the learned judge proceeded, that when Farrar paid his 300*l.* he became entitled in equity to the benefit of the mortgage of 1900, and that Ackroyd became a trustee for him and could not by the deed of August 16 pass the property to Ogden free from that incumbrance, and that consequently that deed and the subsequent deeds had not, because they could not have, the operation which upon their face they appear to carry. This contention is answered, I think, by saying that all parties through Walshaw were carrying out a transaction which all were approving, and that Farrar was content that Ackroyd should reconvey, as he was by the deed of August 16 expressed to reconvey, free from incumbrances, because as part of the same transaction Farrar was going to take that which he did take, namely, a new mortgage from Mrs. Whiteley, the purchaser. The transaction is, I think, consistent with only one intention on the part of all parties, namely, that the debt and security of 1900 should be extinguished and a new debt and security of 1907 should be created. It results, in my judgment, that those entitled to the security of October 16, 1901, take the benefit of the discharge of the mortgage of 1900 and now are entitled to a declaration that the security of October 16, 1901, became, and

C. A 1912

MANKS v. WHITELEY.

Buckley L.J.

If the remainderman declares his intention to keep the charge alive and the debt is not his own debt he can keep it alive, but if he does not so declare the charge is gone. The argument we have heard has been concerned to establish that this is only true if he knows of the subsequent incumbrance. It is said that if he does not know of it, it must be presumed in the absence of evidence of intention that he intended to keep the charge alive against subsequent incumbrances, if any, of which he had not knowledge. I know of no authority to that effect, and in principle it seems to me to be wrong. If he does not declare an intention the presumption is that he does not intend to keep the charge alive when he does know of the subsequent incumbrance. Why should absence of knowledge raise the presumption when ex hypothesi no reason for the intention exists? Where the remainderman pays off the charge it is necessary that he should declare his intention. It is impossible to predicate affirmatively or actively an intention to protect himself against a charge of which upon the hypothesis he had no knowledge. In *Burrell* v. *Earl of Egremont* (1) Lord Langdale (who was dealing with the case of a tenant for life) puts the hypothetical case of its being necessary to shew intention otherwise than by legal presumption and says "the plaintiffs could not have proved that he intended to continue a charge, the existence of which, as a primary charge, was unknown." Where as in the case of the tenant for life the intention is to be presumed, the case is totally different from that of the remainderman where the intention has to be proved. In the former case knowledge is not, in the latter knowledge is, as it seems to me, a necessary factor in determining whether the intention to keep the charge alive exists or not. The principles applicable to the case of a purchaser are not, I think, those applicable to the case of a tenant for life. Upon the authorities they are rather those applicable to the case of a remainderman. *Toulmin* v. *Steere* (2) must, I think, be reviewed, if at all, in the House of Lords. In this Court it must be accepted as being the law.

As matter of fact the way in which this transaction was carried out (a matter which I agree in itself does not determine

(1) 7 Beav. 205, 232. (2) 3 Mer. 210.

the question) plainly establishes, I think, upon the question of intention that all parties intended to do that which in fact the deeds did. It was intended that Ogden should cease to be liable to Ackroyd (a fact which is, I agree, not alone sufficient, for the debt might have been preserved against the land while the personal liability of the mortgagor was released). But not only was Ogden's personal liability to be destroyed, but the debt itself as against the land was to be destroyed also. Farrar, who by paying the 300*l.* had obtained such rights as sub-mortgagee as I have stated, and Mrs. Whiteley, who as to the balance of what was due to Ackroyd presumably became in a position similar to that of Farrar as regards that security, gave up those rights, and Farrar accepted a new mortgage debt and a new security as bought with his money, and Mrs. Whiteley accepted the equity of redemption subject to Farrar's debt as that which was bought with the 48*l.* and the balance of the purchase-money.

A contention has been adduced, and it is I think that upon which the learned judge proceeded, that when Farrar paid his 300*l.* he became entitled in equity to the benefit of the mortgage of 1900, and that Ackroyd became a trustee for him and could not by the deed of August 16 pass the property to Ogden free from that incumbrance, and that consequently that deed and the subsequent deeds had not, because they could not have, the operation which upon their face they appear to carry. This contention is answered, I think, by saying that all parties through Walshaw were carrying out a transaction which all were approving, and that Farrar was content that Ackroyd should reconvey, as he was by the deed of August 16 expressed to reconvey, free from incumbrances, because as part of the same transaction Farrar was going to take that which he did take, namely, a new mortgage from Mrs. Whiteley, the purchaser. The transaction is, I think, consistent with only one intention on the part of all parties, namely, that the debt and security of 1900 should be extinguished and a new debt and security of 1907 should be created. It results, in my judgment, that those entitled to the security of October 16, 1901, take the benefit of the discharge of the mortgage of 1900 and now are entitled to a declaration that the security of October 16, 1901, became, and

C. A. 1912 MANKS v. WHITELEY

now is, the first charge. If A., B., and C. are successive mortgagees of X. the contract between B. and X. includes that if X. pays off A. then B. shall come first. There is nothing unmeritorious in a claim to the benefit thus enjoyed.

Solicitors: *Burn & Berridge, for G. H. Manks, Elland; R. F. & C. L. Smith, for Spencer, Clarkson & Co., Keighley; Williamson, Hill & Co., for Walshaw & Son, Halifax.*

G. A. S.

WARRINGTON J. 1912 *Feb.* 22, 23, 27.

In re PYKE.

BIRNSTINGL *v.* BIRNSTINGL.

[1911 P. 2468]

Tenant for Life and Remainderman—Will—Construction—Residuary Devise and Bequest—Trust to sell and convert—Power to postpone—Power to Trustees to pay for Repairs out of Capital or Income—"Rents, dividends and interest and other produce thereof" pending Conversion to be deemed Income—Lease by Testator—Repairing Covenants—Breach—Dilapidations—Damages recovered by Trustees—Capital or Income—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 53.

Testator by his will devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale and conversion with power to suspend conversion for such period as they should judge expedient, and pending the conversion of his real estate to pay for repairs either out of capital or income, and he provided that for the purposes of enjoyment and transmission under the trusts therein contained his real and personal estate should be considered as money from the time of his decease and that the "rents, dividends and interest and other produce thereof" respectively to accrue due after his decease and until the actual sale, conversion, and getting in thereof should be deemed the annual income thereof. The testator then directed his trustees to hold the proceeds of his residuary estate, after payment thereout of his debts and funeral and testamentary expenses, upon trust to divide the same into certain shares, some of which he settled.

At his death the testator was entitled to a freehold theatre which was subject to a lease granted by him. The lease contained certain repairing covenants by the lessee. The lessee did not perform these covenants, and some years after the testator's death the trustees brought an action against him for breach of covenant and recovered a certain sum of money by way of damages:—

Held, that the money recovered by the trustees as damages must be treated as corpus of the testator's residuary estate.

In re Lacon's Settlement [1911] 2 Ch. 17, distinguished.

WARRINGTON J.

1912

PYKE, *In re.* BIRNSTINGL *v.* BIRNSTINGL.

ADJOURNED SUMMONS.

Joseph Pyke, by his will, dated February 28, 1902, after appointing executors and trustees thereof and bequeathing certain pecuniary and specific legacies, devised unto and to the use of his trustees in fee simple all the real estate of which he might die seised, possessed, or entitled and bequeathed to them all the personal estate of or to which he might die possessed or entitled not otherwise disposed of by his will or any codicil thereto upon trust to sell and convert as therein mentioned, and he empowered his trustees to suspend for such period as they should judge expedient (without being responsible for loss) the sale and conversion of his estate. The will then proceeded as follows: "I empower my trustees to manage and order all the affairs thereof as regards cultivation letting occupation rebuilding building repairs insurance against fire receipts of rent dividends interest indulgences and allowances to and arrangements with tenants mortgagors and others and to make out of the income or capital of my real and personal estate and any hereidtaments for the time being held by my trustees as aforesaid any outlay which my trustees may consider necessary for improvements building rebuilding repairs calls on shares premiums on policies or otherwise for the benefit or in respect of any real and personal estate and any hereditaments as aforesaid and all other matters whatsoever and in the execution of the power of letting to grant building repairing improving mining or other leases for such terms at such rents and generally on such conditions as my trustees shall deem advantageous either taking or not taking fines or premiums which if taken shall be considered as capital. And I declare that for the purposes of enjoyment and transmission under the trusts hereinafter contained my said real and personal estates shall be considered as money from the time of my decease and the rents dividends and interest and other produce thereof respectively to accrue due after my decease and until the actual sale conversion and getting in thereof shall be deemed the actual income thereof applicable

WARRINGTON J.
1912
PYKE, *In re.* BIRNSTINGL *v.* BIRNSTINGL.

as such for the purposes of the said trusts without regard to the amount of such income or to the nature of property or investments yielding the same but no reversion or other property not actually producing income shall be treated as producing income for the purposes of this my will." The testator then directed his trustees to hold the residue of his trust moneys upon trust, after payment thereout of his debts and funeral and testamentary expenses, to divide the same into certain shares, some of which he settled. Then almost at the end of the will there was a general power authorizing the trustees to determine whether any particular moneys were to be treated as capital or income.

The testator died on July 15, 1902.

The testator was, amongst other property, entitled to a freehold theatre. At his death the property was subject to a lease dated August 23, 1897, granted by the testator, which contained the usual lessee's covenants to repair. The lessee did not perform his obligations under those covenants, and in 1906 the trustees commenced an action against him for breach of covenant, and in January, 1908, recovered judgment for a considerable sum of money by way of damages. The money so recovered was represented in part by a sum of 900*l.* in the trustees' hands. The lease had since been determined, and a fresh lease had been granted at a reduced rent, one of its terms being that the lessee should execute certain specified repairs.

This was an originating summons taken out by the trustees for the determination (inter alia) of the question whether the 900*l.* was distributable as income of the testator's residuary estate or formed part of the capital thereof.

The defendants to the summons were H. J. Birnstingl, C. A. Birnstingl, E. M. Birnstingl, and F. N. J. Pyke, who were interested in the capital of the residuary estate, and W. M. Pyke, who was one of the persons entitled to the income thereof.

J. W. Manning, for the summons.

Bryan Farrer, for the defendant H. J. Birnstingl. The money recovered by the trustees is, it is submitted, capital. The estate might have consisted of a theatre in repair, instead of which it

consisted of a theatre out of repair and the right to enforce a covenant by the lessee to repair, that right now being represented by the 900*l.* recovered as damages.

The cases under the Settled Land Acts have no application to this case. A tenant for life is not bound under the Settled Land Act, 1882, to insert a repairing covenant in a lease granted by him, and if he does not do so he thereby obtains a higher rent. If he does insert a repairing covenant, then any damages which he may recover in respect of a breach of it belong to him. But here the persons entitled to the income of the residuary estate are not in the position of tenants for life in the ordinary sense at all. They are merely entitled under the particular provisions of this will to the "produce" of the real estate until it is sold.

W. H. Cozens-Hardy, for the defendants C. A. Birnstingl and E. M. Birnstingl, adopted the same argument. This case is distinguishable from *Noble* v. *Cass.* (1) There, as was pointed out by Kekewich J. in *In re Francis* (2), the trustees who recovered the money were only trustees of the life estate and were not trustees for the remaindermen. Here the trustees were trustees for all the beneficiaries under the will. *In re Lacon's Settlement* (3) is also distinguishable on a similar ground. There the tenant for life in bringing the action was not exercising any of the powers of the Settled Land Acts and was therefore not acting as a trustee for the remaindermen.

[He was stopped.]

G. M. Hildyard, for the defendant F. N. J. Pyke.

T. J. C. Tomlin, for the defendant W. M. Pyke. The money recovered by the trustees is income. A tenant for life is entitled to all casual profits which accrue during the time of his tenancy for life: *Brigstocke* v. *Brigstocke.* (4) The money recovered in the present case is a casual profit to which the tenant for life is entitled: *Noble* v. *Cass* (1); *In re Lacon's Settlement.* (3) Under the will the trustees have power to apply either capital or income in payment for repairs. If they had expended this money under that power they would probably have obtained a higher rent.

(1) (1828) 2 Sim. 343.
(2) (1905) 74 L. J. (Ch.) 198.
(3) [1911] 2 Ch. 17.
(4) (1878) 8 Ch. D. 357, 363.

WARRINGTON J.
1912
PYKE, *In re.*
BIRNSTINGL v. BIRNSTINGL

There is, however, no power in the will enabling money recovered as damages to be applied for repairs, though no doubt the Court would, on application by the trustees, sanction its application for that purpose by way of salvage. In that case the expenditure would probably be thrown rateably on capital and income. Where the lease is granted by the testator or by the trustees and the trustees sue for breach of covenant the question arises who are the beneficiaries for whom they sue. In *Noble* v. *Cass* (1) it was held that damages recovered in an action for breach of a covenant running with the land were not to be considered as part of the inheritance. The mere fact that a tenant for life is an equitable tenant for life does not deprive him of his right to casual profits: *Brigstocke* v. *Brigstocke.* (2)

[WARRINGTON J. The question is whether this fund forms part of the testator's estate which the trustees are administering. The lease having been granted by the testator, the covenant formed part of his estate. By his will he settled, first, the property itself, and, secondly, the covenant.]

The estate must be considered as a whole, a universitas, in respect of which there are rights and obligations. It cannot be divided up into rent, property, and right to sue on the covenant. The mere fact of the intervention of trustees does not affect the rights of the tenant for life. The money recovered by the trustees in this case is only what the tenant for life himself would have been able to recover.

[WARRINGTON J. He is not tenant for life of the whole estate.]

In re Rodes (3) is distinguishable on the ground that the tenant for life in receiving the money paid as consideration for accepting a surrender of a lease was acting as a trustee under s. 53 of the Settled Land Act, 1882. *Chandler* v. *Bradley* (4) was the case of a bribe taken by the tenant for life for executing a lease. *Mitchell* v. *Armstrong* (5) must now, it is submitted, be treated as overruled in so far as it decided that the trustees in that case were entitled to retain as corpus any part of the

(1) 2 Sim. 343.
(2) 8 Ch. D. 357.
(3) [1909] 1 Ch. 815.
(4) [1897] 1 Ch. 315.
(5) (1901) 17 Times L. R. 495.

damages recovered by them for breach of a covenant in the lease granted by the tenant for life.

[WARRINGTON J. It occurs to me that this money in the hands of the trustees may be neither capital nor income, but a fund which they may in the proper administration of the estate apply in payment for repairs.]

If the money is neither capital nor income, then, it is submitted, it is a fund which has been recovered by the trustees in a fiduciary capacity and ought therefore to be apportioned by them between the tenant for life and the remaidermen. The test is, have the remaindermen any greater equity to say that this money is capital than they would have had if it had been recovered by the tenant for life himself? The damages for dilapidations represent something which has reduced the income of the tenant for life and which has been replaced by the lessee under the new lease in consideration of a reduced rent.

Bryan Farrer in reply. The contention on behalf of the defendant W. M. Pyke is based upon two fallacies—first, that he is a tenant for life in the ordinary sense, and, secondly, that the reduction of the rent of the theatre was due to the want of repair. What the trustees took under the residuary gift in the will was the theatre itself plus a chose in action, that is, the right to sue for the breach of the covenant to keep the theatre in repair, and the damages recovered belong to the estate as a whole. This point is covered by the observations of Swinfen Eady J. in *In re Lacon's Settlement*. (1) *In re Rodes* (2) is in my favour. There it was held that money recovered in respect of surface damage was capital.

In order to succeed, the person claiming as tenant for life must shew that the 900*l*. is part of "the rents, dividends and interest and other produce" of the estate to which he is entitled pending conversion, and that "other produce" means something in the nature of "rents, dividends and interest," which the 900*l*. clearly is not.

There is nothing inequitable in holding that the money is capital, since the reduction of the rent may be due to causes other than want of repair.

(1) [1911] 1 Ch. 351, 356. (2) [1909] 1 Ch. 815.

WARRINGTON J.
1912
PYKE, *In re.* BIRNSTINGL *v.* BIRNSTINGL.

WARRINGTON J. The question in this case is whether persons entitled to the income of the testator's residuary estate are entitled to receive as income a sum of 900*l.* now in the hands of the trustees and recovered by them as damages for breach of a covenant to repair contained in a lease granted by the testator. The facts are these. [His Lordship stated the facts, observing that the question was one primarily of the construction of the will, and continued:] The defendant W. M. Pyke put his case in this way. He said, "Treating myself as a tenant for life of the theatre, I am entitled to casual profits; the money recovered by the trustees as damages is a casual profit, and as such tenant for life I am entitled to it." In the first place what he has to make out is not that this money represents casual profits such as would go to a tenant for life in the ordinary sense of this particular property, but that the money in question comes within the words "rents, dividends and interest and other produce" in the will. He is not a tenant for life in the ordinary sense of this particular property, but only a person entitled with others to the "rents, dividends and interest and other produce" of all the items of property comprising the testator's residuary estate pending conversion. In my opinion this money does not come within the words "rents, dividends and interest and other produce" of the residuary estate.

There was vested in the trustees this theatre, subject to the lease, with the benefit of the covenant to repair and other covenants. The money in the hands of the trustees has been recovered by them by virtue of a certain chose in action, namely, the claim under the covenant, which was vested in them as part of the mass coming to them under the will. It was by virtue of that title that they have recovered this money. Is there anything in the provisions of the will which entitles the defendant W. M. Pyke to say that the money is to be regarded as "produce" of the estate? I do not think there is. Suppose that the trustees, instead of suing upon the covenant, had immediately on the death of the testator sold the theatre in its then existing condition, that is, with an existing breach of covenant so that the purchaser could have sued in respect of that breach, some part of the purchase-money would undoubtedly have been

attributable to the existence of that breach of covenant. Could it then have been contended that the persons entitled to the income of the residuary estate would have been entitled to claim part of the purchase-money as income? Such a contention would in my opinion have been hopeless. Is there then any substantial difference between that contention and the contention of the defendant W. M. Pyke in the present case? In my opinion there is not. I think the true answer to the contention is that the words "other produce" were only introduced in order to sweep in what was not covered by the words "rents, dividends and interest," and that the proceeds of the action are not "other produce" in that sense at all.

Reliance is placed by the defendant W. M. Pyke on the decision of the Court of Appeal in *In re Lacon's Settlement* (1), that a tenant for life under the Settled Land Act, 1882, who had sued for and recovered damages for breach of a covenant contained in a lease granted by a previous tenant for life was entitled to retain them. But the answer is that that case was decided on a different state of facts and does not therefore support the contention in the present case. There a previous tenant for life had granted a lease which contained a covenant by the lessee to repair. The reversion expectant on the lease so granted vested in the second tenant for life. He sued the lessee on the covenant and recovered damages, and it was contended that the damages so recovered by him ought to be paid to the trustees. All that the Court of Appeal there decided was that there was no equity to compel the tenant for life to hand over to the trustees the money he had so recovered. The trustees relied on s. 53 of the Act of 1882, which provides that a tenant for life shall in exercising any power under the Act be deemed to be in the position of and to have the duties and liabilities of a trustee for the other parties entitled under the settlement. The answer made to that contention was that in recovering damages for breach of a covenant to repair the tenant for life was not exercising any of the powers of a tenant for life under the Settled Land Acts, but was exercising a right vested in him as the person legally entitled to the reversion, and

(1) [1911] 2 Ch. 17.

WARRINGTON J.
1912
PYKE, *In re.*
BIRNSTINGL *v.* BIRNSTINGL.

therefore that there was no equity either under the settlement or under the Act which would require him to hold the money so recovered for some one else. In the present case it is for the defendant W. M. Pyke to make out a right to the money in the hands of the trustees. I think on the true construction of the will that he does not make that out. The money recovered is not "other produce" to which the persons entitled to the income of the estate are entitled. The 900*l.* must therefore be held by the trustees as part of the testator's residuary estate to be applied by them in any way consistent with the will.

There is one other point to which I desire to refer. The defendant W. M. Pyke says that it is only good sense and equity that the money should be paid to him, because his income has been reduced since the lessee under the new lease pays a smaller rent by reason of his having to make good the dilapidations under the terms of that lease. The answer to that is that the loss falls not only on the persons entitled to income, but also on the remaindermen whose property has diminished in value.

I think that the 900*l.* is not income, but must be treated as corpus, and therefore as applicable for any purpose for which under the will such corpus is applicable.

Solicitors: *Hasties; Cox & Lafone; W. M. Pyke.*

W. I. C.

In re CARDWELL.
ATTORNEY-GENERAL *v.* DAY.

[1911 C. 1466.]

WARRINGTON J.
1912
March 5, 6.

Practice — Costs — Attorney-General — Construction of Will — Originating Summons—Charitable Trusts Act, 1853 (16 & 17 *Vict. c.* 137), *s.* 20—*Rules of the Supreme Court*, 1883, *Order* LV., *r.* 3.

Where the Attorney-General acting under a certificate issued to him under s. 20 of the Charitable Trusts Act, 1853, takes out an originating summons for the determination of a question of construction relating to charitable bequests under a will, as representing the objects of the charity, he is in the same position as any other beneficiary and is entitled to costs out of the estate.

ADJOURNED SUMMONS.

By her will, dated November 10, 1904, Elizabeth Cardwell, who died on October 11, 1906, appointed three persons to be her executors and trustees and bequeathed a number of charitable and other legacies, including legacies of 1000*l.* to the Dewsbury Children's Summer Holiday Fund, 5000*l.* to the Dewsbury and District Nursing Association, and 2000*l.* to the vicar and churchwardens of Hanging Heaton, in the parish of Dewsbury, each of which three legacies she directed to be invested and the income applied as therein directed, and devised and bequeathed her real and personal estate not otherwise disposed of unto her trustees upon trusts for sale and conversion and out of the proceeds of sale to pay her funeral and testamentary expenses and debts and the legacies bequeathed by her will, and to divide the net residue amongst all the charitable legatees thereinbefore mentioned in proportion to the legacies thereinbefore given to such charitable legatees respectively.

This was an originating summons taken out by the Attorney-General, acting under a certificate issued to him under s. 20 of the Charitable Trusts Act, 1853, entitled in the estate of the testatrix against the executors of the will and the representatives of the three above-named charitable institutions.

The summons asked (1.) for the determination of a question

WARRINGTON J.
1912
CARDWELL, *In re.*
ATTORNEY-GENERAL *v.* DAY.

of construction, namely, whether the three proportionate shares of residue were subject to the same restrictions as the three legacies; (2.) if and so far as necessary the establishment of schemes for the application of the shares of residue; and (3.) that the costs of the summons might be provided for having regard to the provision in the testatrix's will as to testamentary expenses.

The executors had in fact distributed the entire estate before this summons was taken out, and this fact was known to the Attorney-General.

Warrington J. having decided the question of construction in favour of the Attorney-General's contention that the three proportionate shares of residue were subject to the same restrictions as the three legacies, and not being asked to establish any scheme, the third question as to costs was argued.

E. Beaumont, for the Attorney-General. The Attorney-General is entitled to his costs out of the fund. The position of the Attorney-General in the case of charities is peculiar. As stated in Tudor on Charities and Mortmain, 4th ed. p. 376, "The Attorney-General, as representing the Crown, is the protector of all the persons interested in the charity funds. He represents the beneficial interest; consequently in all cases in which the beneficial interest requires to be before the Court, the Attorney-General must be a party to the proceedings"; and as to costs it is stated at p. 396, "in the case of successful proceedings the Attorney-General is allowed costs as between solicitor and client," for which proposition *Attorney-General* v. *Stewart* (1) is cited. A similar order was in fact made in *In re Manser* (2), though it is not mentioned in the report. See, too, Morgan and Wurtzburg on Costs, 2nd ed. p. 337, and Daniell's Chancery Practice, 7th ed. p. 60. The rule laid down by Kekewich J. in *In re Buckton* (3), namely, that a beneficiary taking proper proceedings to obtain the decision of the Court upon the construction of a will for the benefit of all parties concerned is

(1) (1872) L. R. 14 Eq. 17, 25. (2) [1905] 1 Ch. 68.
(3) [1907] 2 Ch. 406.

entitled to his costs out of the estate, is as applicable to the Attorney-General as to any other beneficiary.

Cave, K.C., and *MacSwinney*, for the first two charities. There are two points, first, whether this is a case in which the Attorney-General is entitled to ask for costs, and secondly, if so, whether the Court in the exercise of its discretion will give him costs under the special circumstances of the case. As to the first point, we submit that the case falls within the general rule laid down by Lord Cottenham in *Attorney-General* v. *London Corporation* (1), that "where the Attorney-General could be called upon to pay costs (had he been a private individual), then he ought not to receive costs," in other words, the Attorney-General cannot enjoy immunity from payment of costs as representing the Crown and yet ask for payment of his costs. This rule is applicable in proceedings relating to charities. Thus in *In re Macduff* (2), where the Court of Appeal decided against the Attorney-General that a certain testamentary gift was not a good charitable gift, the report concludes: "The costs of the respondents were ordered to be paid out of the estate as in *In re Rymer* (3), it being admitted on all hands that the Attorney-General could not be ordered to pay them."

[WARRINGTON J. In *In re Rymer* (4) Lord Herschell appears to have said that "the appeal should be dismissed with costs."]

That appears to be a mistake. In *Hunter* v. *Attorney-General* (5), where the Attorney-General was the unsuccessful respondent on an appeal to the House of Lords, he was given his costs in the House of Lords, but under exceptional circumstances, Lord Halsbury guarding himself against saying that in all cases the Attorney-General ought to have his costs.

As to the second point, the summons is irregular. The Attorney-General was aware that the entire estate had been distributed, and it really amounts to a claim for payment of costs by the executors personally, leaving them to recover the amount from the residuary legatees. It was wrong under the circumstances to entitle the summons in the matter of the estate

(1) (1850) 2 Mac. & G. 247, 271.
(2) [1896] 2 Ch. 451, 475.
(3) [1895] 1 Ch. 19.
(4) [1895] 1 Ch. 34.
(5) [1899] A. C. 309, 325.

WARRINGTON J.
1912
CARDWELL, *In re.*
ATTORNEY-GENERAL *v.* DAY.

or to make the executors parties, and the summons might under the circumstances have been dismissed with costs.

[WARRINGTON J. The Attorney-General could in any case have taken out a summons in the matter of the trusts alone under Order LV., r. 3, as a cestui que trust.]

Sargant and *Errington*, for the third charity.

Timins, for the executors.

WARRINGTON J. The question in this case is whether, in an action by the Attorney-General for the purpose of ascertaining the construction of a testatrix's will in reference to certain charitable bequests, the Attorney-General as plaintiff ought to be allowed his costs either out of the testatrix's general estate or out of the shares of residue which are directly the subject of the action. In this particular case before the proceedings were commenced the executors had distributed the estate and had paid the shares in question to the legatees. None the less there remained the question how those charitable legatees were to administer the funds so paid to them. The Attorney-General, acting under the certificate of the Charity Commissioners pursuant to s. 20 of the Charitable Trusts Act, 1853, issued this originating summons in the matter of the estate of the testatrix against the executors and the representatives of the three charities. [His Lordship referred to the terms of the summons, and continued:] One objection has been taken to this summons on the footing that inasmuch as the executors have distributed the entire estate it amounts so far as regards costs to a personal claim against the executors for payment of costs out of their own pockets. I may say that, having regard to the circumstances, it may probably have been wrong to have made the executors defendants to the action, which might properly have been framed as an action for the purpose of obtaining a declaration relating to the trusts affecting these particular shares of residue in the hands of the legatees alone, but that is really not a substantial objection. The executors have been made parties; no objection has been taken to that prior to the hearing of the summons, and there would have been no difficulty in putting the summons right if the mistake had been pointed out.

Now, what is the position of the Attorney-General when he comes to the Court, as in the present case, for the purpose of having the construction of the charitable bequests determined? In my opinion he is in the position, as stated in the last edition of Tudor on Charities and Mortmain, 4th ed. p. 376, of the person who represents all the objects of the charity, and they are plaintiffs through him. That being so, what is the position of plaintiffs with regard to costs so far as relates to proceedings in a Court of first instance? There can be no possible question that, although the summons is taken out, not by the trustees, but by the beneficiaries, still, if the litigation is for the purpose of ascertaining the true construction of the testator's will for the benefit of all parties concerned and is not in any way a hostile proceeding, the plaintiffs are, as a general rule, entitled to their costs, which are usually allowed as between solicitor and client, out of the estate or fund the subject-matter of the application. Is there any reason for putting the Attorney-General under similar circumstances in a different position from that of an ordinary plaintiff? It is said that there is a rule somewhat to this effect, that inasmuch as the Attorney-General cannot be ordered to pay costs, therefore, he ought not to receive costs. In my opinion that rule, whatever may be its real scope, does not apply to a case like the present. It does apply in certain cases of hostile litigation, but I do not think that it applies to proceedings such as these, at all events in a Court of first instance. In my opinion in a Court of first instance the Attorney-General, representing as he does the beneficiaries of the charity who are really the plaintiffs acting through him, is entitled to be put in the same position as any other plaintiff. It has been further suggested that, assuming that I have power, which in my opinion I certainly have, to give the Attorney-General his costs, I ought not to exercise it under the circumstances of this case. I see no reason whatever for that suggestion. The Attorney-General has instituted these proceedings, which he has not unreasonably prosecuted, and has succeeded in his contention. The only possible question is with regard to the costs of the executors whom he has made parties, but I do not think that I can order him to pay the costs of the executors. The

WARRINGTON J.
1912
CARDWELL, *In re.* ATTORNEY-GENERAL *v.* DAY.

only order in my opinion which I can make is to direct payment of the costs of the Attorney-General, in the same way as I should direct payment of the costs of an ordinary litigant, out of these funds which are the real subject-matter of the action, and inasmuch as the executors have been brought before the Court I cannot leave them to bear their own costs. The costs of all parties, therefore, as between solicitor and client, must be paid out of the three shares of residue rateably in proportion to their respective values.

Solicitors: *Treasury Solicitor; Ridsdale & Son, for C. L. W. Nicholson, Dewsbury; Ridsdale & Son, for Chadwick, Son & Nicholson, Dewsbury; Crowders, Vizard, Oldham & Co., for Henry Whitfield, Batley.*

A. C.

NEVILLE J.
1912
Feb. 28, 29.

In re HODGSON'S SETTLED ESTATE. ALTAMONT *v.* FORSYTH.

[1911 H. 3705.]

Settled Land Acts—Incumbrance—Liability to repair Highway ratione tenuræ—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 21, *sub-s.* (ii.).

A liability of the owners and occupiers of a settled estate to repair a highway ratione tenuræ is not an incumbrance which the trustees have power to discharge or redeem out of capital moneys in their hands under s. 21, sub-s. (ii.). of the Settled Land Act, 1882.

By an indenture dated December 14, 1911, and made between the rural district council of Hambledon, Surrey, the highway authority for their district, of the first part, the trustees for the purposes of the Settled Land Acts of a settled estate known as the Manor House estate of the second part, and the tenant for life of the third part, it was agreed that, subject to the approval of the Court being obtained to the trustees paying the consideration money of 488*l.* thereinafter mentioned, the tenant for life should apply to the justices of the peace for the county of Surrey for an order that a certain highway known as Holdfast Lane, which the owners or occupiers of the Manor House estate were liable to repair ratione tenuræ, should thereafter be a

highway repairable by the parish of Haslemere, and, by the same order, to fix a certain sum to be paid by the trustees to the council in full discharge of all claims and demands thereafter in respect of the maintenance and repair of the said highway, and that the justices should be asked to fix such sum at 488*l.*, and the council agreed to consent to such an order.

This summons was taken out by the Countess of Altamont, the tenant for life of the Manor House estate, for the determination of the question whether the trustees of the said estate had power, out of the capital money arising under the said Acts in their hands, to apply the sum of 488*l.*, or such lesser sum as might be agreed upon with the council, in discharging the Manor House estate from the perpetual liability to repair the highway known as Holdfast Lane ratione tenuræ.

The defendants were the trustees of the settled estates for the purposes of the Settled Land Acts, and the infant son of the tenant for life, who was entitled to the settled estates in fee simple subject to her life estate. Sect. 21, sub-s. (ii.), of the Settled Land Act, 1882, upon which the argument turned, is set out below. (1)

Beebee, for the tenant for life. This summons raises the point left open by Warrington J. in *In re Earl of Stamford and Warrington* (2), namely, whether a liability to repair a highway ratione tenuræ is an "incumbrance" within the meaning of s. 21, sub-s. (ii.), of the Settled Land Act, 1882. It is submitted that it is. The trustees here have no general powers under the settlement and therefore can only act under the provisions of s. 21. I ask leave to adopt the arguments of Mr. Terrell, K.C., in *In re Earl of Stamford and Warrington*. (3) Warrington J. in his judgment says that the liability is a liability imposed

(1) "Capital money arising under this Act . . . . shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes (namely): . . . .

"(ii.) In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land tax, rentcharge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land."

(2) [1911] 1 Ch. 648, 661.

(3) [1911] 1 Ch. 651, 656.

NEVILLE J. 1912 — HODGSON'S SETTLED ESTATE, *In re.* — ALTAMONT *v.* FORSYTH.

on the land which the occupier can recover from the owner: *Baker* v. *Greenhill.* (1) In all the old cases this liability to repair a highway ratione tenuræ is treated as a charge upon the land: *Reg.* v. *Duchess of Bucklugh* (2); *In re The Hundred of Blackheath* (3); *Reg.* v. *Bucknell* (4); *Rex* v. *Stoughton.* (5) It is a liability which affects every successive owner of the land, and is a liability or charge permanently affecting the inheritance of the land, and therefore it is an incumbrance on the land. By s. 18 (i.) of the Land Transfer Act, 1875, the liability to repair highways ratione tenuræ is not to be deemed an incumbrance on registered land within the meaning of that Act, which provision rather infers that the liability would otherwise be an incumbrance. In *In re Knatchbull's Settled Estate* (6) land drainage charges were held not to be an incumbrance within s. 21, but that was because the principal and interest were made payable by the tenant for life over a limited period. *Egg* v. *Blayney* (7) may be cited against me, but it is distinguishable. There the paving expenses were not a charge on the land, but a personal liability of the owner. A highway repairable ratione tenuræ can be repaired as a highway by the parish and the expenses recovered from the party liable: Glen on Highways, 2nd ed. pp. 131, 140. In *Payne* v. *Esdaile* (8) tithes were held to be a charge on land.

[NEVILLE J. Assuming that this liability is a charge on the land, does that carry you home? Is not the question whether it is included in s. 21, sub-s. (ii.)?]

It is submitted that it is then an incumbrance affecting the inheritance within the spirit and meaning of the section because it is a pecuniary charge which permanently affects the inheritance. The words of the section are wide enough to cover it. The special matters mentioned in the section were not considered incumbrances by the conveyancers (Sugden on Vendors and Purchasers, 14th ed. p. 322) and that is the reason why they are

(1) (1842) 3 Q. B. 148.
(2) (1704) 1 Salk. 357.
(3) (1702) 1 Salk. 362.
(4) (1702) 7 Mod. 55, 99.
(5) (1670) 2 Wms. Saund. 157, 158, e. (9).
(6) (1885) 29 Ch. D. 588, 591.
(7) (1888) 21 Q. B. D. 107.
(8) (1888) 13 App. Cas. 613, 623, 626.

specifically mentioned in this section, and directed not to be deemed incumbrances by s. 18 of the Land Transfer Act, 1875.

[NEVILLE J. That section is rather against you, for the liability to repair highways ratione tenuræ is specially mentioned.]

Cotton L.J. in *In re Knatchbull's Settled Estate* (1) says that all the things specified in this section are of a perpetual nature, and so distinguishes them from land improvement charges which are only for a term of years. The liability to repair is perpetual.

Sampson, for the trustees. There is a difficulty in holding this to be an incumbrance because the liability is in the first instance a liability of the occupier, not the owner: *Daventry Rural Council* v. *Parker*. (2) An incumbrance must be something which can be enforced against the inheritance. If *Payne* v. *Esdaile* (3) is to be taken as fully governing the interpretation of this section, every one of the specifically mentioned charges is an incumbrance and there was no need to mention them. The liability is not really perpetual, because if the local authority alter the character of the road, e.g., by macadamizing it, the liability ceases: *Reg.* v. *Barker*. (4)

NEVILLE J. I think the point raised in this summons is not very easy to determine, having regard to the words used in s. 21, sub-s. (ii.), of the Settled Land Act, 1882. The point I have to decide is whether an obligation to repair a highway ratione tenuræ is an incumbrance within the meaning of that sub-section which the trustees for the purposes of the Settled Land Acts are able to discharge out of capital moneys in their hands. The words are "In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land tax, rentcharge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land." I think in a certain sense this obligation may be described as an incumbrance, and as charged on or payable out of the settled land, because the land cannot be sold or dealt with except subject to this liability. But if I confine myself to the ordinary interpretation

(1) 29 Ch. D. 588, 592.
(2) [1900] 1 Q. B. 1.
(3) 13 App. Cas. 613.
(4) (1890) 25 Q. B. D. 213.

NEVILLE J. 1912 HODGSON'S SETTLED ESTATE, *In re.* ALTAMONT *v.* FORSYTH.

of incumbrance, this liability is not one, that is, it is not a periodical payment, or a sum of money, charged on the land in the sense that if it is not paid the land itself may be made liable for payment. The question is, Did the Legislature intend to use the word in its ordinary sense or in the extended sense I have suggested? I think I am precluded from interpreting the word "incumbrance" in that wider sense by the specific words added at the end of the sub-section; all the specified charges, "land tax, rentcharge in lieu of tithe, Crown rent, chief rent, or quit rent" are incumbrances in quite as ample a sense as a liability to repair a highway ratione tenuræ. If the word "incumbrance" is not read as including the specified charges it is difficult to see how it can be read as including this liability. If it is so read the added specific words are unnecessary. Moreover there are certain facts about this liability which may have induced the Legislature to exclude it from this sub-section. It is uncertain in amount, and uncertain as to the time at which it may be payable, and it is uncertain in duration, because, as was pointed out in argument, something, such as alteration in the quality of the road by a local authority, may happen at any time which would relieve the occupier and owner from the liability. It is also a point which I think should not be lost sight of, that in s. 18 of the Land Transfer Act, 1875, this liability to repair a highway ratione tenuræ is included among the liabilities, rights, and interests to which land may be subject which are not to be deemed incumbrances for the purpose of registration.

The matters referred to in s. 21, sub-s. (ii.), of the Settled Land Act, 1882, are almost the same as those directed not to be deemed incumbrances under the Land Transfer Act, 1875. But this liability to repair a highway ratione tenuræ is omitted from the Settled Land Act, though other liabilities arising from tenure are included. That suggests that the Legislature excluded this liability deliberately. I am of opinion, therefore, that I cannot in this case say that the trustees are entitled to apply the capital moneys in their hands to the purpose of getting rid of this liability.

Solicitors: *Carleton Holmes, Fell & Wade.*

J. R. B.

PUBLIC TRUSTEE *v.* LAWRENCE.

[1911 P. 1350.]

SWINFEN EADY J.

1912

March 25, 26, 27; April 2.

Mortgage—Lease by Mortgagor in Possession—Special Extension of Statutory Power—Special Proviso for Delivery of Counterpart to Mortgagee—Lease under Extended Power—Non-delivery of Counterpart—Validity of Lease—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict.* c. 41), *s.* 18, *sub-ss.* 11, 14.

A mortgage deed contained a declaration that the power of leasing conferred by law on a mortgagor should extend to a lease by the mortgagors for any term not exceeding 1000 years "provided that a counterpart of any such lease, duly executed by the lessee, be delivered to the mortgagees their executors administrators and assigns within one calendar month next after the execution thereof" and the consent thereto of the mortgagees should not be required.

Sect. 18 of the Conveyancing Act, 1881, confers certain powers of leasing on a mortgagor in possession.

Sub-s. 11 provides that the mortgagor shall, within one month after making the lease, deliver to the mortgagee a counterpart of the lease duly executed by the lessee; "but the lessee shall not be concerned to see that this provision is complied with."

Sub-s. 14 provides that any further or other powers of leasing reserved or conferred by the mortgage deed shall be exerciseable, as far as may be, as if they were conferred by the Act, and with all the like incidents, effects, and consequences, "unless a contrary intention is expressed in the mortgage deed":—

Held, that no intention to exclude sub-s. 11 was expressed by the mortgage deed, and consequently a lease under the extended power was valid even if no counterpart was delivered to the mortgagees.

ACTION.

By a mortgage dated August 28, 1895, the mortgagors conveyed eleven acres of freehold land to the mortgagees in fee simple by way of mortgage for securing 4000*l.* and interest.

The mortgage contained the following power of leasing:—"And it is hereby declared that the power of leasing conferred by law on a mortgagor shall extend to a lease by the mortgagors their heirs or assigns of the said premises or any part thereof for any term not exceeding 1000 years provided that a counterpart of any such lease duly executed by the lessee be delivered to the mortgagees their executors administrators and assigns within one calendar month next after the execution thereof and the consent thereto of the mortgagees shall not be required."

SWINFEN EADY J.

1912

PUBLIC TRUSTEE v. LAWRENCE.

On November 20, 1895, the mortgagors conveyed the equity of redemption to W. R. Franklin.

On April 2, 1896, W. R. Franklin demised six acres of the property to George Franklin for 999 years from March 25, 1895, at a rent of 30*l.*

On January 31, 1907, George Franklin sub-demised the six acres to the defendant Lawrence for the residue of the term of 999 years less one day by way of mortgage for securing 900*l.* and interest.

W. R. Franklin was adjudicated a bankrupt on February 21, 1910. George Franklin died on February 14, 1910, insolvent, and on May 2, 1910, an order was made under s. 125 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), for the administration of his estate in bankruptcy, and thereupon his property vested in the defendant the official receiver. The defendant Lawrence was in possession under her leasehold mortgage.

On July 7, 1911, the plaintiff, to whom the original freehold mortgage was transferred in 1910, brought this action for a declaration that the lease of April 2, 1896, was not authorized by the power of leasing in the mortgage and was not binding on the plaintiff as claiming under the mortgage, but was subject to the plaintiff's estate and interest thereunder. He also claimed delivery of possession.

The plaintiff alleged (inter alia) that no counterpart of the lease was delivered to the mortgagees within one calendar month after the execution thereof or at all, and impeached the lease on this and other grounds.

The defendant the official receiver did not enter an appearance, and on August 24, 1911, he disclaimed all interest in the lease.

The defendant Lawrence contended (inter alia) that even if the delivery of a counterpart to the mortgagees was not established by the evidence, the lease was still valid, and on this point the case is reported.

Gore-Browne, K.C., and *Sargant*, for the plaintiff. Delivery of a counterpart to the mortgagees was essential to the validity of this lease. The lease was made under a special power by which the statutory power was extended to a lease not exceeding

1000 years provided that (i.e., on condition that) a counterpart be delivered to the mortgagees within one calendar month. There are no words similar to those of s. 18, sub-s. 11, of the Conveyancing Act, 1881, protecting the lessee in case the condition is not complied with. The proviso is an express condition, and unless complied with, the extended statutory power never arose.

Hon. Frank Russell, K.C., and *Bischoff*, for the defendant Lawrence. The power in the mortgage is an extension of the statutory power of leasing under s. 18 of the Conveyancing Act, 1881. That section confers certain limited powers of leasing on a mortgagor in possession.

Sub-s. 8 provides that a counterpart shall be executed by the lessee and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall, in favour of the lessee, be sufficient evidence.

Sub-s. 11 provides that "In case of a lease by the mortgagor, he shall, within one month after making the lease, deliver to the mortgagee . . . . a counterpart of the lease duly executed by the lessee; but the lessee shall not be concerned to see that this provision is complied with."

Sub-s. 13 provides that this section applies only if and as far as a contrary intention is not expressed in the mortgage deed and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained.

Sub-s. 14 provides that nothing in this Act shall prevent the mortgage deed from reserving to or conferring on the mortgagor any further or other powers of leasing "and any further or other powers so reserved or conferred shall be exerciseable, as far as may be, as if they were conferred by this Act, and with all the like incidents, effects, and consequences, unless a contrary intention is expressed in the mortgage deed."

In the present case there is no express contrary intention to exclude sub-ss. 8 and 11. Under sub-s. 8 the lease is evidence that a counterpart was delivered to the lessor, and under sub-s. 11 the lessee was not concerned with the delivery to the mortgagees.

The plaintiff contends that the lease was invalid under the special proviso unless a counterpart was delivered within the

SWINFEN EADY J.

1912

PUBLIC TRUSTEE v. LAWRENCE.

month. But the parties to the mortgage cannot have intended that the validity of the lease should be in suspense during that period. The proviso is not really a condition. It is merely a direction for the delivery of a counterpart. The fact that this direction is superfluous having regard to sub-s. 11 does not shew an express intention to exclude that sub-section.

Gore-Browne, K.C., in reply. Sub-s. 8 only applies to execution and delivery of a counterpart to the lessor. It does not affect our complaint that it was not delivered to the mortgagees. The express power of leasing coupled with the express proviso shews an intention to exclude sub-s. 11. If sub-s. 11 was incorporated under sub-s. 14 the proviso might have been altogether omitted. Sub-s. 11 is merely a direction to the mortgagor, and the statute not unnaturally provides that the lessee shall not be concerned to see that he complies with that direction. But in granting such a large extension of the statutory power the mortgagees were not content to rely on sub-s. 11. They therefore inserted an express proviso in the form of a condition, and omitted any words protecting the lessee. This proviso was in complete substitution for sub-s. 11, which is therefore excluded. The provisions of the extended power were not complied with and the lease is void against the plaintiff.

Cur. adv. vult.

April 2. SWINFEN EADY J., after holding that the proper inference to be drawn from the facts proved in the case was that a counterpart had been delivered to the mortgagees, continued: There is, however, the further question whether even if no counterpart had been delivered the lease would have been invalid against the mortgagees. By the Conveyancing Act, 1881, s. 18, a mortgagor in possession is empowered to grant certain leases. By sub-s. 11 the mortgagor shall, within one month after making the lease, deliver to the mortgagee a counterpart executed by the lessee; "but the lessee shall not be concerned to see that this provision is complied with." By sub-s. 14 the mortgage deed may reserve to or confer on the mortgagor any further or other powers of leasing "and any further or other powers so reserved or conferred shall be exerciseable, as far as

may be, as if they were conferred by this Act, and with all the like incidents, effects, and consequences, unless a contrary intention is expressed in the mortgage deed." The mortgage deed in question refers to the power of leasing conferred by law on a mortgagor, and confers a further or other power, by extending the statutory power of leasing to granting leases for 999 years. It also provides for a counterpart being delivered within one month to the mortgagees; but in my opinion the provision in sub-s. 11 that the lessee shall not be concerned to see that the provision for the delivery of the counterpart lease is complied with applies to a lease granted under the extended power as well as to a lease granted under the statutory power. There is not any contrary intention expressed in the mortgage deed on this point, and therefore sub-s. 14 applies and all the statutory incidents, effects, and consequences are introduced. The result is that failure to deliver a counterpart to the mortgagees would not invalidate the lease although it would cause the statutory power of sale to become immediately exerciseable under s. 20, clause iii., of the same Act.

[His Lordship then dealt with other points of the case and dismissed the action.]

Solicitors: *Morley, Shirreff & Co.; Chester, Broome & Griffithes, for Wm. Perkins, Hepherd & Winstanley, Southampton.*

G. R. A.

PARKER J.
1912
Feb. 23, 26.

In re CAVENDISH.
GROSVENOR *v.* BUTLER.

[1911 C. 1728.]

Settlement — Construction — Hotchpot Clause — Settled Fund — Covenant to settle After-acquired Property—Trusts by Reference.

By a marriage settlement made in 1877, after reciting that by virtue of a prior settlement and deed poll the wife was entitled to a reversionary sum of 15,000*l.*, but subject to a provision in the deed poll for the reduction thereof in case the wife should make default in bringing the same into account in the division of certain trust funds in the deed poll mentioned, the said sum of 15,000*l.* was settled, subject to the life interests of the husband and wife, in trust for children of the marriage as the husband and wife should jointly appoint, and in default as the survivor should appoint, and in default in trust for children of the marriage in equal shares, the sons to take vested interests at twenty-one and the daughters at twenty-one or marriage. Then followed a usual hotchpot clause relating to "the said trust premises," and usual powers of maintenance and advancement with the usual ultimate trusts in default of children in favour of the wife. The settlement contained an agreement to settle the wife's other or after acquired-property upon trusts for sale and conversion, the proceeds to be held "upon the trusts and with and subject to the powers, provisoes, agreements and declarations herein declared concerning the said sum of 15,000*l.* hereinbefore expressed to be hereby assigned," and further provided that, notwithstanding the said agreement, if the wife became entitled to any interest which ought to be settled pursuant to the said agreement but under the provisions of the said deed poll would go in satisfaction of the 15,000*l.*, it should be lawful for the trustees to release any such interest with the intent of keeping the 15,000*l.* intact and unreduced. The husband and wife appointed the 15,000*l.* in favour of one daughter and died without having made any further appointment:—

Held, that for the purposes of the hotchpot clause the 15,000*l.* and the other or after-acquired property were distinct funds, and that the daughter was entitled to share in the other or after-acquired property without bringing the 15,000*l.* appointed to her into hotchpot.

In re Marquis of Bristol [1897] 1 Ch. 946, followed.

In re Perkins (1892) 67 L. T. 743; 41 W. R. 170, distinguished.

ADJOURNED SUMMONS.

By the settlement, dated November 12, 1877, made on the marriage of the Honourable Charles Compton William Cavendish (hereinafter called the husband) and Lady Beatrice Constance

Grosvenor (hereinafter called the wife), after reciting that by virtue of an indenture of settlement dated April 27, 1852, and a deed poll under the hand and seal of the then Duke of Westminster, dated November 10, 1877, the wife was entitled to a sum of 15,000*l.*, being part of a sum of 30,000*l.* or other sum raisable under the said indenture of settlement for the portions of the younger children of the Duke and which would become payable to her, her executors, administrators or assigns, immediately after the death of the Duke, but subject to a provision in the said deed poll contained for the reduction of the said sum of 15,000*l.* as therein mentioned in case the wife should make default in bringing the same sum into hotchpot in the division of certain trust funds in the said deed poll more particularly mentioned among the younger children of the Duke as in the said deed poll mentioned; and after reciting that upon the treaty for the said intended marriage it was agreed that the said sum of 15,000*l.* should be assigned to the trustees upon the trusts and with and subject to the powers, provisoes, agreements and declarations thereinafter declared and contained concerning the same; and after reciting that upon the treaty for the said intended marriage the Duke had agreed to covenant for the payment of such annual sum as was thereinafter mentioned, and that it was also agreed that the settlement should contain the provisions thereinafter contained with reference to the settlement of such annual sum, and also of all (if any) such present and future property of the wife as was thereinafter and in that behalf mentioned, it was witnessed that the said sum of 15,000*l.* payable on the death of the Duke and the income thereof, but subject to the liability of the said sum to be reduced in case the same should not be brought into hotchpot as aforesaid, were assigned to the trustees in trust to receive payment thereof when the same should become payable, and after the solemnization of the said intended marriage to invest the said sum of 15,000*l.*, or such other sum as should become payable under the said deed poll, as therein directed; and upon further trust to pay the income to the wife during the joint lives of herself and the husband, for her separate use without power of anticipation, and after the death of such one of them as should first die, to the

PARKER J. 1912 CAVENDISH, *In re.* GROSVENOR *v.* BUTLER.

survivor of them, during her or his life, and after the death of the survivor should stand possessed of the said trust moneys and the income thereof in trust for the children of the marriage (other than an eldest or only son as therein described) as the husband and wife should by deed jointly appoint, and in default of such appointment as the survivor should by deed or will appoint, and in default of any appointment, if there should be but one child (other than an eldest or only son as aforesaid), in trust for that one child, to be an interest vested in such child being a son at the age of twenty-one years or being a daughter at that age or marriage; and if there should be two or more children then in trust for such two or more children in equal shares, the share of a son to be an interest vested at the age of twenty-one years and the share of a daughter to be an interest vested at that age or marriage. Then followed a hotchpot clause as follows: "Provided always that no child who shall take any part of the said trust premises under any appointment in pursuance of the powers lastly hereinbefore contained shall in default of appointment to the contrary have or be entitled to any share of the unappointed part of the said trust premises without bringing the share or shares appointed to him or her into hotchpot and accounting for the same accordingly." Then followed usual powers of advancement and maintenance, and the ultimate limitations in default of children who should attain a vested interest were in trust for the wife, her executors and administrators, in case she should survive the husband, but if the husband should survive the wife then in trust for such persons as the wife should by will appoint, and in default of appointment in trust for the persons who under the Statutes of Distribution would have become entitled thereto at the wife's death in case she had died intestate and without having been married. The settlement further contained the following provisions: "And it is hereby agreed and declared, that if the wife now is, or if during the said intended coverture, she, or the husband in her right, shall, at one and the same time, and from one and the same source, become seised or possessed of or entitled to any real or personal property of the value of 500*l.* or upwards, for any estate or interest whatsoever, in possession,

reversion, remainder, or expectancy (except jewels, trinkets, ornaments, furniture, plate, plated goods, pictures, prints, and books, and other articles of the like nature, which it is hereby declared shall belong to the wife for her separate use, and except any sum or sums of money paid by way of income or annual payment to which she may be or become entitled under any of the provisions herein contained) then and in every such case the husband and wife, and all other necessary parties, shall, at the cost of the said trust estate, as soon as circumstances will admit, and to the satisfaction of the said trustees or trustee for the time being, convey, assign, and assure the said real or personal property to, or otherwise cause the same to be vested in, the said trustees or trustee upon trust that they or he shall, with all convenient speed, and in such manner as they or he shall think fit (but as to reversionary property, not until it shall fall into possession, unless it shall appear to the said trustees or trustee that the capital of the trust estate will probably be injured by deferring the sale), sell, or call in and convert into money, such part or parts of the said property as shall not consist of money, or of stocks, funds, shares, or securities hereinbefore authorised as investments, or of an annuity or annuities or other estate or interest for the life of the wife, or for any term or period determinable on her death; and shall stand possessed of the moneys to arise from such sale, calling in, and conversion, and of such part or parts of the said property as shall consist of money, or of such stocks, funds, shares, or securities as aforesaid, and of the stocks, funds, shares, and securities, in or upon which such moneys respectively may be invested, and of the interest, dividends and income of the same several moneys, stocks, funds, shares, and securities respectively, upon the trusts, and with and subject to the powers, provisoes, agreements, and declarations herein declared concerning the said sum of 15,000*l.* hereinbefore expressed to be hereby assigned, and the stocks, funds, shares, or securities, upon which the same, or any part thereof, may be invested, and the interest, dividends, and income thereof respectively, or as near thereto as the nature of the property will allow; And upon trust that the said trustees or trustee shall pay and apply any annuity or annuities and the income of any other

PARKER J. 1912 CAVENDISH, *In re.* GROSVENOR *v.* BUTLER.

estate or interest for the life of the wife, or for any term of years determinable on her death, to the persons, for the purposes and in the manner, to whom and for and in which the interest, dividends, and income of the said trust premises, the trusts whereof are lastly hereinbefore declared, shall or would, for the time being, be applicable under the same trusts; but with power to the said trustees or trustee, with the consent in writing of the wife, at any time to sell the same in such manner as they or he shall think fit, so nevertheless that the money to arise from such sale be held and applied upon the trusts, and with and subject to the powers, provisoes, agreements, and declarations herein declared concerning such part of the personal estate of or to which the wife now is, or she or the husband in her right, shall become seised, possessed of, or entitled as aforesaid, as shall originally consist of money; Provided always and it is hereby agreed and declared, that notwithstanding the agreement hereinbefore contained for the settlement of such other or after acquired property of the wife as aforesaid, if the wife now is, or if during the said intended coverture she, or the husband in her right shall become entitled to any share or interest in any trust funds or other moneys or property which but for this provision ought to be settled in pursuance of the said agreement in that behalf but under the provisions of the said deed poll of November 10, 1877, the same, if taken or received by the said wife, her executors, administrators, or assigns, would be and go in or towards satisfaction of the said sum of 15,000*l.* hereinbefore expressed to be hereby assigned as in the same deed poll is mentioned, then and in every such case it shall be lawful for the said trustees or trustee for the time being to relinquish or concur with the wife and the husband or any other person or persons in relinquishing all or any part of the said share and interest and all the rights, title, claim, or demand which they, he, or she may have, in or upon or in respect of the same, to the intent that thereby the said sum of 15,000*l.* hereinbefore expressed to be hereby assigned may remain intact and unreduced; and for the purposes aforesaid or any of them it shall be lawful for the said trustees or trustee to execute and do every such instrument, deed, or thing, as they or he shall think fit."

The deed poll of November 10, 1877, referred to in the above stated settlement was an appointment by the Duke of the said sum of 15,000*l.* to the wife, and it expressly provided that the wife should not be entitled to any part of several trust funds of a large amount therein mentioned without bringing the said sum of 15,000*l.* into hotchpot and accounting for the same in the division of the said several trust funds among the younger children of the Duke, so that if she should take any part of the said several trust funds (other than the said sum of 15,000*l.*) without bringing the said sum of 15,000*l.* into hotchpot as aforesaid, the amount of the other trust funds which she should so take should be and go in and towards satisfaction of the said sum of 15,000*l.*; and in every such case so much of the said sum of 15,000*l.* as should be equal to the amount so received by her out of the said several trust funds should go over and remain and be to the same persons and for the same purposes as if no appointment of the same had been thereby made.

There were four children of the marriage—(1.) Charles William Hugh, who attained twenty-one and died in 1900 intestate, letters of administration to his estate being granted to Lady Constance Mary Butler; (2.) Lilah Constance; (3.) Marjorie Beatrice, who died in 1897 under twenty-one and unmarried; and (4.) John Compton, who (as his Lordship decided on a former hearing of this summons) was the "eldest son" within the meaning of the settlement.

By a deed poll dated July 7, 1903, the husband and wife jointly appointed the said sum of 15,000*l.*, which in the events which happened had become payable in full, to Lilah Constance Cavendish on the occasion of her marriage with Sir Mervyn Edward Manningham Buller.

The husband died on November 9, 1907, and the wife on January 12, 1911, without having further exercised their powers of appointment. In addition to the sum of 15,000*l.*, property of the wife to the value of some 25,000*l.* was brought into the settlement under the agreement to settle her other or after-acquired property.

The present summons was taken out by the trustees of the settlement for the purpose of determining (inter alia) the question

PARKER J. 1912 CAVENDISH, *In re.* GROSVENOR *v.* BUTLER.

whether the sum of 15,000*l.* and the property brought into settlement under the agreement to settle other or after-acquired property of the wife were to be treated as distinct funds or as one fund for the purposes of the hotchpot clause.

Gregson, for the trustees.

A. Grant, K.C., and *J. G. Wood*, for Lady Butler. The two funds are amalgamated for the purposes of the hotchpot clause. *In re Perkins* (1) is directly in point. The decision of Romer J. in *In re Marquis of Bristol* (2) will be cited against us, but that case is distinguishable, as the two funds in that case were derived from different sources and, except as to the trusts in favour of the children, were subject to different limitations; and the referential language in that case was also different, being "upon such and the same or the like" trusts, powers, provisoes, and agreements. [They also referred to *In re North.* (3)]

Romer, K.C., and *Ashworth James*, for Lady Buller. It is impossible to treat these two funds as one fund for the purposes of the hotchpot clause without altering the trusts of the sum of 15,000*l.*, which the Court is not at liberty to do. The case is governed by *In re Marquis of Bristol.* (2) *In re Perkins* (1) was the case of a will, not a deed. The reasoning of Romer J. in the first case is exactly applicable. Moreover the clause following the agreement to settle the other or after-acquired property in the present case is meaningless if the two funds were intended to be treated as one fund for all purposes. The practice of conveyancers has been to indicate expressly any intention to amalgamate the two funds for the purposes of the hotchpot clause, if it is so intended: see Wolstenholme's Forms, 6th ed. p. 102; Key and Elphinstone's Conveyancing, 9th ed. vol. ii. pp. 543, 544; Prideaux's Conveyancing, 20th ed. vol. ii. p. 357; and Encyclopædia of Forms and Precedents, vol. xiii. p. 421.

A. Grant, K.C., in reply. The form in the present case was obviously taken from Davidson's Conveyancing, 3rd ed. vol. iii. pt. ii. p. 728, and from a note to pt. i. p. 171 it appears that the authors were alive to the point, since, after referring to

(1) 67 L. T. 743; 41 W. R. 170. (2) [1897] 1 Ch. 946.
(3) (1897) 76 L. T. 186.

Montague v. *Montague* (1), where on marriage two separate sums were provided by separate deeds for the portions of younger children, and each deed contained a hotchpot clause, and it was held that these clauses were separate and distinct, and that the clause in each settlement operated only on the fund comprised in that settlement, they go on, "It does not follow, however, that the same principle of decision would be applied to the case of an express and implied hotchpot clause contained in the same settlement." The forms in the later editions of the text-books seem to have been specially framed to meet the decision in *In re Marquis of Bristol.* (2) The ratio decidendi, however, of Romer J. in that case was that the funds were derived from different sources and were subject to different limitations in some respects and is inapplicable to the present case.

C. W. Turner, for another party.

PARKER J. The question which I have now to decide arises on the construction of the marriage settlement of 1877. By that settlement a sum of 15,000*l.* which had been appointed to the wife by her father was settled upon trusts in favour of the wife and the husband during their lives, and after the death of the survivor upon trusts in favour of the children of the marriage. The settlement contained a covenant by the husband and wife for the settlement of the other or after-acquired property of the wife. The trusts of the sum of 15,000*l.* were first declared. These trusts, after the death of the survivor of the husband and wife, are trusts in favour of the child or children of the marriage as the husband and wife shall jointly appoint, and in default of such appointment as the survivor shall appoint, and in default of any appointment, in trust for all the children in equal shares, the sons to take vested interests at the age of twenty-one years and the daughters at that age or marriage, and then follows the usual hotchpot provision that "no child who shall take any part of the said trust premises under any appointment in pursuance of the powers lastly hereinbefore contained shall in default of appointment to the contrary have or be entitled to any share of the unappointed part of the said trust premises without bringing

(1) (1852) 15 Beav. 565. (2) [1897] 1 Ch. 946.

PARKER J. 1912 CAVENDISH, *In re.* GROSVENOR *v.* BUTLER.

the share or shares appointed to him or her into hotchpot and accounting for the same accordingly." As a matter of construction it appears to me to be reasonably clear that the expression " the said trust premises " there refers and refers only to the sum of 15,000*l.* which is settled by the prior part of the deed. Up to that point it is the only property to which the expression can be referred, unless it be the property referred to in the recitals. The effect of the clause appears to me to be this, that the unappointed part of the sum of 15,000*l.* is to be divided equally between the children except that any one who has had a share of it appointed to him or her under the powers of appointment is to give credit for the share so appointed to him or her in the usual way.

The subsequent covenant to settle other or after-acquired property is obviously adopted from Davidson's Conveyancing, 3rd ed. vol. iii. pt. ii. p. 728. It is in the usual form providing that the property is to be conveyed at the cost of the trust estate to the trustees upon trust for sale and that the trustees are to stand possessed of the moneys to arise from such sale " upon the trusts, and with and subject to the powers, provisoes, agreements and declarations herein declared concerning the said sum of 15,000*l.* hereinbefore expressed to be hereby assigned " ; that is to say, the provision declares the trusts of the other or after-acquired property by reference to the trusts of the sum of 15,000*l.* In the clause there is no express direction whether for the purposes of the hotchpot clause the two funds are to be treated as one. Conveyancers have long been aware of the point and have been in the habit of inserting a provision to indicate the intention. In the absence of such an express provision the question is left open to be determined on the construction of the document as a whole. Now it appears to me to be quite clear that I cannot treat the two funds as combined and amalgamated for the purposes of the hotchpot clause in the present case without modifying the previously declared trusts relating to the sum of 15,000*l.*; for if I treat the two funds as amalgamated, any unappointed part of the sum of 15,000*l.* would be divided equally not only with reference to the appointed portions of that fund, but with

reference also to any appointments of the other or after-acquired property, and I have therefore at once to modify the trusts declared of the sum of 15,000*l.* If I can do that, there is no reason why I should not also modify the trusts of the other or after-acquired property, but I cannot alter the one without altering the other, and the question is whether the Court is at liberty to modify the trusts in that way. There appear to be only two authorities bearing on the subject—*In re Perkins* (1), before North J., where the question arose under a will, and *In re Marquis of Bristol* (2), before Romer J. In the present case I have to deal with a deed, not a will, and the principles of construction are in some ways different. In *In re Perkins* (1) North J. came to the conclusion on the construction of the will in that case respecting three funds, the trusts of two of which were declared by reference to the other, that the testator intended to constitute a single fund, and did not hesitate to hold that for the purposes of the hotchpot clause the three funds were to be treated as one. On the other hand, in *In re Marquis of Bristol* (2), where the question arose under a marriage settlement, Romer J. had two funds to deal with, the wife's fund, consisting of a sum of 13,000*l.* Consols, and the husband's fund, consisting of 5000*l.* policy moneys, and for the purposes of the trusts in favour of the children the trusts of the husband's fund were declared by reference to the trusts of the wife's fund. Romer J. was asked to decide that the effect of that reference was to amalgamate the two funds so far as the hotchpot clause was concerned. He appears to have felt the same difficulty which I feel, namely, that that would be to alter the trusts declared of the first fund. "I do not see my way," he says at the commencement of his judgment, "to hold that the funds settled by this settlement, the 13,000*l.* and the policy moneys, are to be regarded, or can be regarded, as one for the purpose of the hotchpot clause. Clearly I could not hold that the trusts of the 5000*l.* in default of appointment are to be governed by reference to the appointments of the 13,000*l.*, if I did not also hold, on the other hand, that the trusts of the 13,000*l.* in default of appointment must be governed by reference to what was done with

(1) 67 L. T. 743. (2) [1897] 1 Ch. 946, 948.

PARKER J. 1912 CAVENDISH, *In re.* GROSVENOR *v.* BUTLER.

regard to the 5000*l.* Now the trusts of the 13,000*l.* are themselves very clear, and this is a case of a deed, and not a case of a will, and it appears to me it would be a very strong thing indeed to say that I can alter the trusts of the 13,000*l.* by reason of the subsequent trusts as to the 5000*l.*"

That passage states the difficulty which in my opinion is equally applicable to the present case. Romer J., however, goes on to explain that on the face of the deed there was no reason for treating the two funds as one for all purposes; and he points out that they came from different sources and that the ultimate trusts in default of children were of necessity different, and then, partly on that ground and partly on a minute examination of the words, he held that the case before him was distinguishable from *In re Perkins* (1); but I think that the real reason for his decision was placed in the forefront of his judgment and was the difficulty in a marriage settlement of altering the trusts of a fund by reason of the trusts of another fund in a subsequent part of the deed. In the present case, if I come to examine the question whether there is any reason on the face of the deed for treating the two funds as one for the purposes of the hotchpot clause, I come to the conclusion that there is not and that the parties did in fact contemplate these funds as two distinct funds, and I think that is clear for the following reasons. The sum of 15,000*l.* was originally appointed to the wife by a deed poll dated November 10, 1877, which contained a provision that, in case she should make default in bringing the same sum into hotchpot as between herself and the other younger children of the then Duke of Westminster in the division of certain funds mentioned in the deed poll, the share or interest which she might take in the division of those funds should go in satisfaction of the sum of 15,000*l.* the appointment of which should be pro tanto revoked. Now turning to the settlement of 1877 I find immediately following the agreement for the settlement of the wife's other or after-acquired property a proviso that, notwithstanding the agreement for the settlement of other or after-acquired property, if the wife or her husband in her right should become entitled to any share or interest in any trust funds which

(1) 67 L. T. 743.

but for this provision ought to be settled under the agreement for the settlement of other or after-acquired property, but under the provisions of the deed poll of November 10, 1877, would, if taken by the wife, go in satisfaction of the sum of 15,000*l.* as in the deed poll mentioned, in every such case it should be lawful for the trustees to relinquish or concur with the wife and husband in relinquishing all or any part of such share or interest to the intent that thereby the said sum of 15,000*l.* might remain intact and unreduced. It appears to me that this clause shews that the parties considered that the sum of 15,000*l.* acquired under the deed poll of November 10, 1877, was a different fund from the funds comprised in the agreement for the settlement of the wife's other or after-acquired property, since, if the two funds had been amalgamated for all purposes, it would have been useless to insert any such clause, for in that case it would have been immaterial to the parties whether the whole fund was made up as to part in one way and as to the rest in another. It appears to me, therefore, that this clause, for what it is worth, does indicate that the parties considered the two funds to be separate funds; but I do not know that it is really necessary to resort to this clause for the purpose of construing this deed in the way I have done, since it leaves the primary difficulty untouched, and it is only material so far as it helps to distinguish the present case from *In re Perkins* (1) and to bring it within *In re Marquis of Bristol.* (2) I am of opinion, therefore, that I ought to follow the decision of Romer J. in *In re Marquis of Bristol* (2), and declare that the two funds are not to be treated as amalgamated for the purpose of the hotchpot clause, and that the unappointed funds are now divisible in equal moieties without Lady Buller being bound to bring into account the sum of 15,000*l.* appointed to her.

Solicitors: *Boodle, Hatfield & Co.; Corbin, Greener & Cook; Stow, Preston & Lyttelton; Currey & Co.*

(1) 67 L. T. 743. (2) [1897] 1 Ch. 946.

A. C.

EVE J.
1912
April 18.

In re FIRTH.
FIRTH *v.* LOVERIDGE.

[1911 F. 1219.]

Trust and Trustee—Appointment of Public Trustee—Expediency—Ground of Expense—Order to prohibit—Public Trustee Act, 1906 (6 *Edw.* 7, c. 55), *s.* 5, *sub-s.* 4.

Where a sole trustee, desiring to retire, proposed to exercise his statutory power by appointing the Public Trustee in his place, the estate being of the value of upwards of 38,000*l.* (part being building land), and all but one of the tenants for life and some of the remaindermen (a class likely to be largely increased) being in favour of the appointment, the Court refused to make an order, under s. 5, sub-s. 4, of the Public Trustee Act, 1906, prohibiting the appointment.

Whether it is open to a beneficiary applying for an order under the sub-section to base his application solely on the ground of the expense which the appointment would involve, *quære.*

But, assuming that it is, the fact of that expense, provided that it is not exceptional or disproportionate, cannot in ordinary cases be treated as a material element in determining whether it is "expedient" or not to make the order.

Adjourned Summons.

William Firth by his will, after appointing the defendant George Henry Loveridge and two other persons to be executors and trustees thereof, and bequeathing certain specific and pecuniary legacies, devised his dwelling-house, 17, Trinity Terrace, to his trustees on trust for sale and to hold the proceeds on trust to pay the income to his three surviving sons in equal shares during their lives and after the death of each of the sons to hold the share to the income of which such son would have been entitled if living upon trust for the testator's grandchildren living at that son's death (other than the children of one son) and the issue of grandchildren then dead as therein mentioned.

He devised his share or interest in certain Shipley properties upon trust for sale, empowering his trustees to concur with the co-owners in developing the properties and in disposing of them as building estate or otherwise, the proceeds of sale to be held in trust for his three surviving sons and six daughters in equal

shares during their lives, and after the death of each of the sons and daughters to hold the share on trust for the grandchildren as in the case of the Trinity Terrace property.

He devised and bequeathed his residuary estate upon trust for sale for the benefit of his six daughters for life and after the death of each daughter to hold one sixth of the residuary fund on trust for the grandchildren as in the cases of the Trinity Terrace and Shipley properties.

The testator died on December 24, 1903.

The will was proved by G. H. Loveridge alone, and he alone of the three persons named by the testator accepted the trusts of the will. He remained sole trustee up to the time of the present application.

G. H. Loveridge, being desirous of retiring from the trusteeship and having unsuccessfully made efforts to obtain a suitable private person to act in the trust, gave notice to the beneficiaries, under s. 5, sub-s. 4, of the Public Trustee Act, 1906 (1), that, in exercise of his statutory power to appoint new trustees, he proposed to appoint the Public Trustee in his place.

An originating summons was thereupon taken out by one of the testator's sons and two grandchildren, against other children and grandchildren and G. H. Loveridge, for an order, under sub-s. 4, that the defendant G. H. Loveridge might be restrained from appointing the Public Trustee and that two persons named might be appointed instead.

One of the testator's six daughters had died on January 9, 1907, without having been married.

The testator's house, 17, Trinity Terrace, had been sold and was represented by a fund of 3417*l.* 19*s.* 7*d.* (more or less).

(1) Public Trustee Act, 1906, s. 5, sub-s. 4: "Notice of any proposed appointment of the Public Trustee either as a new or additional trustee shall where practicable be given in the prescribed manner to all persons beneficially interested who are resident in the United Kingdom and whose addresses are known to the persons proposing to make the appointment, or, if such beneficiaries are infants, to their guardians, and if any person to whom such notice has been given within twenty-one days from the receipt of the notice applies to the Court, the Court may, if having regard to the interests of all the beneficiaries it considers it expedient to do so, make an order prohibiting the appointment being made . . . ."

EVE J.
1912
FIRTH, *In re.* FIRTH *v.* LOVERIDGE.

Part of the Shipley property had been sold and the proceeds (less a share distributed on the death of the daughter) were represented by a fund of about 3998*l.* 14*s.* 11*d.*, while a portion remained unrealized.

The residuary estate (less a sixth share distributed on the daughter's death) consisted of investments valued at 30,616*l.* 3*s.*

An affidavit in support of the summons was filed by a grandchild of the testator, being one of the plaintiffs, a married woman who attained twenty-one in May, 1911, in which she submitted that "if the defendant Loveridge . . . . is not able himself to find trustees willing to act he should confer with the beneficiaries and only appoint the Public Trustee as a last resource. . . . . The appointment of the Public Trustee as a trustee of the estate will be a source of expense . . . . and having regard to the nature of the estate it is more suitable for management by private individuals than by a public official. . . . . The development and realization of the unsold part of the" building estate "will be better effected under the direction of private trustees."

G. H. Loveridge stated in his affidavit in opposition that he had on several occasions taken steps with a view to procuring the appointment of a suitable person known to the majority of the beneficiaries and in whom they had confidence as trustee of the will to act jointly with himself, but had been unable to find one; that he was willing to appoint nominees of his own as soon as he could find them; and that the unsold parts of the Shipley estate could, in his opinion, be realized on the instructions of the Public Trustee quite as advantageously as on the instructions of private trustees living at a distance from the properties and without knowledge of local conditions.

Of the eight tenants for life, all but one (a plaintiff) were in favour of the appointment of the Public Trustee. Ten remaindermen, a class which was likely to be largely increased, were in esse, of whom three were in favour of the appointment; the views of one were not known; and six supported the application, of whom two were infants, two had mortgaged their interests, and two were plaintiffs.

Jessel, K.C., and *J. M. Lightwood*, for the summons. The plaintiffs prefer personal trustees to the Public Trustee. Suitable private trustees are the best persons to appoint and proper steps have not yet been taken to obtain them. The defendant trustee should be held to what he said in his affidavit, namely, that he is willing to act with private trustees as soon as he is able to find them. The Court, in considering whether it is expedient to prohibit the appointment of the Public Trustee, has to "have regard to the interests of all the beneficiaries." It must have regard to what is for the benefit of the beneficiaries as a whole. The Act does not say their "opinion" or "wishes" are to be the criterion. Before allowing the Public Trustee to be appointed, the Court ought to give the beneficiaries an opportunity of finding suitable private trustees. The only question is whether it is "expedient" at the present stage to let the Public Trustee be appointed. The plaintiffs say it is not.

[EVE J. Does not the Act assume that prima facie the Public Trustee is as eligible as any private trustee? "Expedient" means what will facilitate matters. The burden is on the plaintiffs to shew that it will facilitate matters to prohibit the appointment of the Public Trustee.]

They cannot discharge that burden without submitting names, and they ought to be given the opportunity of doing so. Their case is strong, because all are agreed to have private trustees if proper ones are found.

[EVE J. The trust may go on for a long time, and the appointment of the Public Trustee might avoid repeated new appointments.]

In *In re Hope Johnstone's Settlement Trusts* (1) Parker J. said that, though trustees who desired to retire might appoint the Public Trustee, the powers of the Act should only be resorted to if there was no other way out of the difficulty. In *In re Claremont* (2), where a prohibiting order was asked for and matters had gone further than they have yet gone here, Eve J. appointed other trustees than the Public Trustee. The summons

(1) (1909) 25 Times L. R. 369.
(2) Unreported. See Annual Practice, 1912, vol. i. p. 863.

EVE J.
1912
FIRTH, *In re.* FIRTH *v.* LOVERIDGE.

should stand over, and there should be a reference to chambers for names to be submitted.

Ingpen, K.C., and *Theodore Ribton*, for four defendant remaindermen, two being infants. These defendants support the plaintiffs' case both on the score of the expense which the appointment of the Public Trustee would entail and because private trustees who would take a greater personal interest are preferable.

P. O. Lawrence, K.C., and *W. M. Cann*, for the trustee and some beneficiaries, most being tenants for life. This case involves a principle of general importance. The policy of the Public Trustee Act, 1906, s. 5, is that the Public Trustee is as eligible as any one else to be appointed a trustee. Sub-s. 4 places a certain limitation on that, but for that limitation to have effect it is necessary first to satisfy the Court that in the interest of all the beneficiaries it is not expedient that the Public Trustee should be appointed. The question of expense cannot be taken into account, because that would always apply to the appointment of the Public Trustee. In this case the fees, say 80*l.* on acceptance of the trust, another 80*l.* on distribution of capital, and 25*l.* a year for distribution of income, are very moderate. An overwhelming majority of the persons entitled for life desire the appointment of the Public Trustee. As to the remaindermen, their interests are contingent and it is impossible to say who they will ultimately be.

The question of what is meant by "expedient," so as to justify the intervention of the Court, has been dealt with in earlier cases under s. 25 of the Trustee Act, 1893: see cases collected in Lewin's Law of Trusts, 12th ed. ch. 26, pp. 838, 839. Expediency has been held to apply to cases of infancy, incapacity through age and infirmity, or bankruptcy of a trustee, or of difficulty in obtaining administration to a deceased trustee. It means that there exists some difficulty in appointing trustees otherwise than through the Court. *In re Hope Johnstone's Settlement Trusts* (1) is a striking example of the principle. The head-note of that case is misleading, as representing Parker J. laying down a general proposition, whereas what he said had express reference to the

(1) 25 Times L. R. 369.

special circumstances of the case. Here there is nothing approaching the condition of things existing there. There is no suggestion of any harm to the beneficiaries if the Public Trustee is appointed. The two trustees proposed in the summons do not even know the beneficiaries. There is no evidence whatever that it is "expedient" to prohibit the appointment of the Public Trustee. *In re Higginbottom* (1) shews that the Court will not interfere, if the person having the power to appoint is willing to do so; unless he wilfully refuses to appoint or is mismanaging the property, the Court will stand aside. Whoever takes this trust must needs act through agents.

Jessel, K.C., in reply. The other side have not met the point that all are ready to have private trustees if they can be found, and that the development of the building estate requires private trustees. It may be true that the Court will not ordinarily interfere with a power to appoint trustees, but in the case of the Public Trustee it is expressly told to do so if it is expedient, and the Court cannot determine whether it is expedient or not without materials.

EVE J. The testator, William Firth, died on December 24, 1903; of the three persons whom he had nominated as his executors and trustees, one only, the defendant George Henry Loveridge, proved the will and accepted the trusts thereof. The defendant thus became and he has since remained sole trustee of the will, but he is now desirous of retiring, and proposes to exercise the statutory power vested in him by appointing the Public Trustee sole trustee of the will. He has given the requisite notice, under sub-s. 4 of s. 5 of the Public Trustee Act, 1906, of the proposed appointment, and some of the beneficiaries now apply to the Court under the same sub-section for an order prohibiting the appointment being made.

In determining whether such an order ought to made the Court is to "have regard to the interests of all the beneficiaries," and the order is only to be made in cases where, "having regard to the interests of all the beneficiaries," the Court "considers it expedient" to make it.

(1) [1892] 3 Ch. 132.

EVE J.
1912
FIRTH, *In re.* FIRTH *v.* LOVERIDGE.

Before any question of expediency can be considered it is necessary to ascertain who are the beneficiaries, what is the trust estate, and how are the several beneficiaries respectively interested therein.

Under the testator's will the beneficiaries are divided into two classes, tenants for life and remaindermen, and the trust estate falls under three categories. There is first a fund of about 3000*l.* representing proceeds of sale of the testator's house, 17, Trinity Terrace. Next, there is a fund of about 4000*l.* representing proceeds of sale of a part of the testator's interest in a building estate at Shipley, and, in addition, the unrealized part of his interest therein. This is subject to a trust for sale, with a power to postpone and with power until sale to join with the other persons interested in the estate in its development. There is no evidence before the Court shewing what is the value of this unrealized part, but Mr. Lawrence, on instructions, puts it at a sum considerably less than that which represents the realized portion. Thirdly, there is the residuary estate consisting of stocks and shares, of the approximate value of 30,000*l.*

The persons who are interested as tenants for life in each of these three several items of property are different. The three surviving sons of the testator are tenants for life of the Trinity Terrace proceeds. The same three sons and the five surviving daughters of the testator are tenants for life of the Shipley property; and the five daughters are tenants for life of the residue. Of the tenants for life, all except one oppose the present application, that one being the plaintiff Sam Pullen Firth, who is entitled for his life to one third of the income from the Trinity Terrace proceeds and to one eighth of the Shipley income. So far, therefore, as the tenants for life are concerned, there is an overwhelming majority opposing the present application.

The interests of all the persons entitled in remainder are contingent. As each tenant for life dies the capital of the share producing his or her life interest is to be divided amongst such of the testator's grandchildren—sons and daughters of his four sons other than Sam Pullen and of his six daughters—as shall be living at the death of the particular tenant for life. At present there are ten such grandchildren in esse, but the state of

the family makes it probable that the class may hereafter be largely increased. Of these ten, the views of one are unknown; six support the application, and three oppose it; of the six who support, two have mortgaged their contingent reversionary interests, the mortgagees are not parties to the summons, but, from the fact that the solicitor of the mortgagors, who are two of the plaintiffs, is in one case himself the mortgagee and in the other case acts for the mortgagee, I think it may be assumed that the mortgagees take the same view as the mortgagors; two others of the six are infants, represented by their guardian ad litem, an old friend of the family I am told, but he has not filed any affidavit or given me any information as to why he supports the application. The only evidence in support of the application is that of a young married granddaughter of the testator who attained the age of twenty-one in May last, and it is confined to a general statement that the estate is of such a nature that it would be better administered by private trustees than by a public official, by which, I am told, the deponent means to convey that the unrealized interest in the building estate would be more profitably dealt with, both pending and on sale, if the services of some local expert could be gratuitously secured in the development of the estate by appointing him a trustee. Such an experiment would, I think, be an extremely dangerous one, and certainly not one which I could for a moment countenance. Gratuitous services are not infrequently very expensive to those who avail themselves of them. Apart from the difficulty of finding a competent expert who, unless actuated by affection towards the beneficiaries or the testator, would be willing to give gratuitously the time and attention necessary for the management of the property, there is always the risk of making a wrong selection and perhaps saddling the estate with some crank who looks upon somebody else's property as an ideal subject whereon and wherewith to experiment according to some peculiar ideas of his own. But I need not pursue this point further, for there is no evidence here that the services of any such man as is suggested are available, or that, if available, they are in the least desirable. The testator's outstanding interest in the estate must in due course be realized, and in the meantime there is no

EVE J.
1912
FIRTH, *In re.* FIRTH *v.* LOVERIDGE.

suggestion that the property is not being properly managed and developed in conjunction with those who are more largely interested in it than is the testator's estate. It is idle to expect any Court to act upon, or indeed to pay any serious attention to, a general statement such as I have referred to contained in an affidavit of a deponent who is hardly more than a child and who is speaking of matters of which she practically knows nothing.

In my opinion there is no evidence whatever upon which any Court would be justified in holding that in this case it is expedient to prohibit the donee of the power from appointing the Public Trustee to take his place.

But apart from any matter of evidence it is said that another reason for prohibiting the appointment is the expense thereby incurred. For many reasons I do not think there is any substance in that objection. So far as the expense is involved in the distribution of the income I can put it aside, because, as I have already pointed out, all the tenants for life upon whom that expense will fall, with one single exception, support the appointment, and in considering the question from the point of view of those interested in the corpus of the estate there are several circumstances to be remembered. To begin with, the estate cannot be finally distributed until the last survivor of the eight tenants for life dies, and its administration may therefore extend over a period which would involve the trouble and expense of appointing many sets of new trustees if the execution of the trusts is left in the hands of private individuals; then, again, I cannot forget that the ten remaindermen now in esse are not by any means likely to be the only persons who will ultimately participate in the estate; on the contrary, the class will in all probability be largely increased; and, thirdly, I think this is pre-eminently a case where the expense chargeable against the corpus represents a very moderate premium for the absolute security thereby purchased for the benefit of those who will ultimately participate in the capital. The administration must be a lengthy one—different individuals may be entitled to participate at each distribution—many of them will be very young, and some it is quite obvious will be, to borrow a phrase

from this same Act, "persons of small means"—all characteristics of a trust and cestuis que trust particularly liable to be abused and wronged if unfortunately it and they should fall into the hands of dishonest trustees. Assuming, therefore, that it is open to a beneficiary applying for an order such as this to base his application on the ground of expense alone, I should still say that, in this case at all events, the fact that expense is involved does not make it expedient to prohibit the appointment.

But, in addition to all this, I think the true answer, in any but exceptional cases, to the argument based on the ground of expense is that suggested by Mr. Lawrence, namely, that sub-s. 4 of s. 5 is part of an Act which contemplates the payment of remuneration to the Public Trustee and the incurring of some expense in all cases where he is appointed, and the Legislature cannot have intended that, in ordinary cases not involving any exceptional or disproportionate expenditure, the mere fact that the appointment would involve expense should be treated as a material element in determining the question whether it is "expedient" or not to make an order prohibiting the appointment.

I think I have now said all that is necessary to dispose of this application, but Mr. Jessel contended that, instead of dealing with it as I have done, I ought to allow the summons to stand over generally in order that an opportunity might be given to his clients to find and nominate suitable private individuals as new trustees, and he suggested that, if they were successful and the summons then came on, the Court would put before the donee of the power the alternative of accepting the nominees of the applicants or of being restrained from appointing the Public Trustee. If that state of circumstances existed, I should find great difficulty in adopting the course suggested; if the donee of the power were unwilling to accept the persons nominated, I do not know what jurisdiction I should have to force the wishes of the beneficiaries on him, and, if he insisted in his proposal to appoint the Public Trustee, the nomination of other individuals by persons not having the power of appointment could not possibly operate to suspend his power to nominate and appoint,

EVE J.
1912
FIRTH, *In re.*
FIRTH *v.* LOVERIDGE.

and could not, as it seems to me, be a proper ground for restraining him under this sub-section. But, however that may be, the real answer is that the state of things does not exist. The donee of the power has made many efforts to secure a suitable private trustee, and, having failed, has abandoned the effort and proposes to appoint the Public Trustee. Those who oppose that appointment do not at present bring forward any person whom he is willing to accept, even if I were to think it expedient to prohibit him appointing the Public Trustee. My duty is, I think, to dispose of the matter now, and not to allow it to stand over, and in all the circumstances I must dismiss the application, and, if the respondents ask for it, with costs.

Solicitors: *H. Reid Sharman; A. G. Maskell; Johnson, Weatherall & Sturt, for Wade, Bilbrough, Tetley & Co., Bradford.*

A. L.

WARRINGTON J.
1912
March 22.

SMITH *v.* MACNALLY.

[1912 S. 785.]

Education—Public Elementary School—Non-provided School—Dismissal of Schoolmistress—Contract of Service—Notice of Determination—Powers of Managers — Consent of Local Education Authority — Dismissal "on grounds connected with the giving of religious instruction in the school"—Religious Belief of Teacher—Injunction—Education Act, 1902 (2 *Edw.* 7, *c.* 42), *s.* 7, *sub-ss.* 1, 5, 6, 7.

In 1906, after the passing of the Education Act, 1902, the plaintiff entered into an agreement with the then managers of the H. non-provided public elementary school, which was a Church of England school, for her employment as a teacher. On October 28, 1911, the defendants, the present managers of the school, gave the plaintiff a month's notice to determine her agreement, alleging as their reason that they were not satisfied with the religious instruction given by her in the school. Until that notice was given no complaint with regard to the religious instruction given by the plaintiff had ever been made. The consent of the local education authority had not been obtained by the defendants to the dismissal of the plaintiff. On November 30, 1911, the notice expired and the plaintiff left.

The plaintiff brought the present action for an injunction to restrain the defendants from acting on the notice of October 28, 1911, and for a

declaration that she was still entitled to exercise the duties of the office of teacher, and moved for an interim order.

At the hearing of the motion it appeared from the evidence of the defendants that their real ground for dismissing the plaintiff was that in their opinion she had ceased to be a member of the Church of England. This the plaintiff denied:—

Held, that under s. 7 of the Education Act, 1902, the position of the plaintiff was not merely that of a servant who had entered into a contract of employment with a master, a term of which was that she should not be dismissed except upon his compliance with certain conditions, but that she had a statutory right to the position which she had acquired under the Act unless and until the requirements of the Act with regard to her dismissal had been complied with.

Held, also, that the ground of dismissal appearing by the evidence was not a ground "connected with the giving of religious instruction in the school" within the meaning of s. 7, sub-s. 1 (*c*), and therefore that the consent of the local education authority to the plaintiff's dismissal was necessary.

Held, therefore, that the plaintiff was entitled to the injunction and declaration she asked.

In order to render a dismissal without the consent of the local education authority a valid dismissal under s. 7, sub-s. 1 (*c*), of the Act it is necessary not merely that the managers should in their own minds consider that a ground for dismissal connected with the giving of religious instruction exists, but that the ground should in fact exist.

MOTION.

In 1900 the plaintiff, then Miss Alice Maria Harris, was appointed a supplementary teacher in the Hartwell non-provided school at Hartwell, in the county of Northampton, of which school the defendants were the present managers.

On August 1, 1906, after the passing of the Education Act, 1902, an agreement was made between the defendant the Reverend C. R. Macnally, the vicar of the parish, and others, therein referred to as the managers, of the one part, the Education Committee of the Northampton County Council, therein called the local education authority, by J. L. Holland, their clerk and agent duly appointed for that purpose, of the second part, and the plaintiff, therein called the teacher, of the third part, for the employment of the plaintiff as an assistant teacher. Clause 6 of this agreement was as follows: "This agreement may be terminated after one calendar month's previous notice in writing to that effect has been given by either party hereto to the other

WARRINGTON J.
1912
SMITH v. MACNALLY.

on the first day of any month. No part of the teacher's holidays shall be reckoned in such period of one month, and if such notice be given by the managers it shall be given in accordance with the decision of a meeting convened by notice sent to every manager four days at least before the meeting, stating that the termination of the teacher's agreement will form part of the business of such meeting; but this agreement shall not be terminated by the managers unless there is a reasonable cause for so doing, such cause being stated to the teacher in writing. Provided always that such notice, except when given solely on grounds connected with the giving of religious instruction in the school, shall not be valid unless the consent of the Local Education Authority has been obtained thereto. With the exception aforesaid the teacher shall have a right to appeal to the Local Education Authority before their consent is given to any notice terminating this agreement."

The agreement was signed by J. L. Holland as consenting for and on behalf of the local education authority to the appointment of the plaintiff as assistant teacher in the school.

In 1908 the plaintiff was married and became Mrs. A. M. Smith.

On August 18, 1911, the plaintiff absented herself from school on account of her approaching confinement, and a supply teacher was appointed in her stead.

On August 31, 1911, the plaintiff received from the defendant Macnally, who was the correspondent of the school managers, the following notice purporting to terminate her agreement:—"The managers of the Hartwell Church of England School hereby give you notice that the agreement between themselves and you will be terminated on the 30th of September, 1911, as they do not desire any longer to retain the services of a married woman teacher."

On October 17, 1911, the plaintiff received from the defendant Macnally the following further letter:—"The Local Education Authority have notified to the managers that the notice terminating the agreement between you and the managers which was handed to you on the 30th September, 1911, is not valid, and that, therefore, the Local Education Authority are

unable to give their consent to the termination of the agreement. The managers, therefore, give you the alternative of either (*a*) resigning your post as teacher, or (*b*) having your agreement terminated under section 7, clause (*c*), of the Education Act, 1902, under which clause the consent of the Local Education Authority is not necessary."

On October 21 the plaintiff replied to that letter, and on October 28 she received the following reply:—"At a meeting of the managers held on the 27th instant the following resolution was entered on the minutes and the correspondent was desired to forward a copy to you:—'That Mrs. A. M. Smith be given notice that the agreement between the managers of Hartwell Church of England School and herself be terminated on 30th November, 1911, on grounds connected with the giving of religious instruction in the school, the reason for the termination of the agreement being that the managers are not satisfied with the religious instruction given by Mrs. A. M. Smith in the school.'"

Until that notice was given no complaint with regard to the religious instruction given by the plaintiff had ever been made. The reports of the diocesan inspectors as to the religious instruction given in the school had always been uniformly favourable to the teachers.

On November 30, 1911, that notice expired and the plaintiff left.

Attempts were made by the local education authority to obtain the reinstatement of the plaintiff, but those attempts having failed, the plaintiff, on March 4, 1912, issued her writ in the present action claiming (1.) an injunction to restrain the defendants from acting or purporting to act on the notice of October 28, 1911, to terminate her employment as supplementary teacher in the school; (2.) a declaration that she was still entitled to exercise the duties of that office; and (3.) damages.

On March 5 the plaintiff served a notice of motion for an interim order in the terms of claims (1.) and (2.) of the writ. The motion came on for hearing on March 22.

In opposition to the motion the defendant Macnally filed an affidavit in which he deposed as follows:—

"4. The above named plaintiff at the time of her appointment

WARRINGTON J.
1912
SMITH
v.
MACNALLY.

as a teacher in the said schools . . . . was a member of the Church of England, and up to about the middle of the year 1910 continued to be a regular and consistent attendant at the ordinary Church services and also a regular attendant at Holy Communion at the parish church of Hartwell. From and after that time the plaintiff became and has continued an active supporter of the Wesleyan Methodist Society at Hartwell. She is a regular attendant at their meeting house, and has played the organ at services there. Having regard to the facts set out in paragraph 3 hereof she could not properly have been appointed a teacher in the said schools had she been a supporter of the Wesleyan Methodist Society in the year 1900 when she was appointed. The principal difference between the tenets of the Established Church and that of the Wesleyan Methodists is that the latter do not believe in confirmation and hold different doctrines about baptism, both of which are essential points of the doctrines of the Church of England, and as such should be introduced into the ordinary religious teaching of a Church of England school.

"5. In the opinion of the managers the plaintiff by her conduct as mentioned in the last preceding paragraph proved that she had ceased to be a member of the Established Church of England, and they were on that ground desirous of terminating her engagement as teacher, and the notice given to the said plaintiff and referred to in clauses 6 and 7 of her said affidavit was given in good faith and under compulsion of a sense of duty and not with any intention of avoiding a reference to the Local Education Authority with regard to the dismissal of a teacher."

The other defendants filed a joint affidavit in which they concurred in the above statements made on their behalf.

The plaintiff by her affidavit in reply deposed that at the time of her appointment she was and had since continued to be and was at the present moment a member of the Church of England.

Cave, *K.C.*, and *H. Lynn*, for the plaintiff. The notice of October 28, 1911, dismissing the plaintiff is invalid both under the agreement of August 1, 1906, and under s. 7

of the Education Act, 1902. (1) There is no evidence that the notices to the managers themselves required by clause 6 of the agreement were ever given. The giving of such notices is made a condition precedent to a valid dismissal of the teacher. Further the teacher ought to have had an opportunity afforded her of being heard in her own defence before the notice of dismissal was given : *Fisher* v. *Jackson.* (2)

The ground now alleged for dismissal is not a ground "connected with the giving of religious instruction in the school" either within clause 6 of the agreement or s. 7, sub-s. 1 (*c*), of the Act of 1902, and the consent, therefore, of the local education authority was required to the dismissal of the teacher, and that consent has not been obtained. The plaintiff is therefore entitled to the injunction and declaration she asks.

Bernard Campion, for the defendants. The plaintiff was validly dismissed. The intention of s. 7 of the Act of 1902 is clear. In non-provided public elementary schools the managers are left entirely free as to the persons whom they shall appoint to give religious instruction in the schools and as to the character of that religious instruction to be there given. Even if they act capriciously there is no remedy against them. The conditions and provisions in s. 7 are not directly mandatory enactments, but are the terms on which the voluntary schools can take the benefits given them by the Act if they choose : per Farwell L.J. in *Gillow* v. *Durham County Council.* (3)

In the present case the dismissal has taken effect and the plaintiff's place has been filled up. It is not therefore a case in which the Court ought to grant an interim injunction.

When the plaintiff ceased to attend the church and began to absent herself from Holy Communion and to attend the services at the Wesleyan chapel the managers took up the position, which it is submitted they were perfectly entitled to take up, that the plaintiff was no longer a fit and proper person to give religious instruction in a Church of England school. With a view, however, of avoiding a religious controversy in the parish they endeavoured on other grounds to get the plaintiff to retire. The writ discloses

(1) See note on p. 827, post. (2) [1891] 2 Ch. 84.
(3) [1911] 2 K. B. 1074, 1087.

WARRINGTON J. 1912 SMITH v. MACNALLY.

no cause of action. Nowhere is it alleged that the notice is invalid. No suggestion until to-day has been made that the notice is contrary to the provisions of the agreement. Sub-s. 6 of s. 7 of the Act makes it clear that that section was intended to give the managers the widest possible control over the religious instruction given in the school. The combined effect of sub-ss. 6 and 7 and sub-s. 1 (*c*) is to enable managers of non-provided schools to dismiss teachers without the consent of the local education authority on grounds connected with the giving of religious instruction, and one of those grounds may, it is submitted, be the religious belief or religious practices of the teacher himself.

Assuming then that the managers are acting under the agreement in giving the notice, then the proper remedy, if any, is damages for wrongful dismissal.

[WARRINGTON J. This is not a case of wrongful dismissal. The plaintiff's case is that she has not been dismissed at all.]

There is an ample remedy in damages. In the present case the dismissal has taken effect and the plaintiff's place in the school has been filled up. The Court ought not to grant an interlocutory injunction to compel an employer to continue to employ a person whom he alleges he has dismissed.

Cave, K.C., in reply. Under the Act of 1902 the position of a teacher is not that of a servant who has entered into a contract of employment with the managers. Sect. 7, sub-s. 1 (*c*), was intended to confer on teachers a status which they are entitled to retain unless and until the requirements of sub-s. 1 (*c*) with regard to dismissal have been complied with. The sub-section makes the nominal employers employers sub modo only.

[WARRINGTON J. referred to *Smith* v. *Martin*. (1)]

The Court has power in a case like the present to grant an interim injunction against the managers: *Crisp* v. *Holden*. (2) The Court is therefore asked to grant the interim injunction and thereby preserve the status quo.

WARRINGTON J. This is an application by a woman, who has been, until lately at all events, a teacher in a non-provided

(1) [1911] 2 K. B. 775. (2) (1910) 54 Sol. J. 784.

school, for an injunction restraining the defendants, who are the managers of the school, from acting, or purporting to act, upon a notice purporting to dismiss the plaintiff from her employment as teacher in that school. The facts are these. [His Lordship then stated the facts down to the giving of the notice of October 28, 1911, substantially as above set forth, and continued:] Until the giving of that notice no complaint about the religious instruction given by the plaintiff had ever been made. The reports of the diocesan inspectors as to the religious instruction had been uniformly favourable to the teachers. What the real ground was I will state presently as appearing by the affidavit made by the defendant Macnally upon the present application.

I now go back to the Act of 1902 and to the provisions of the agreement of 1906, because the plaintiff's case is that the notice of October 28, 1911, was not a valid notice, terminating her employment under the provisions either of the agreement or of the Act, and further that by reason of the Act she is not merely in the position of a servant contracting with a master, but that she has a status given her by statute, which she is entitled to ask the Court to maintain on her behalf. Now the material provisions of the Act are these: [His Lordship read s. 7, sub-s. 1, clauses (*a*), (*b*), and (*c*), and sub-ss. 5, 6, and 7, and continued:]

The first question which arises upon that Act is whether the provision in s. 7, sub-s. 1 (*c*), is nothing more than a condition upon which the maintenance of the school by the local education authority depends, that is to say, whether it is nothing more than a provision which if not complied with will enable the local education authority to withdraw their support from the school. In my opinion that is not so. In my judgment, the school being in fact an elementary non-provided school, the provisions of s. 7, sub-s. 1, become part of what one may call the constitution of the school. That I think is shewn, if anything were wanting beyond the sub-section itself, by sub-s. 7. Sub-s. 7 it is quite plain is not one of the provisions or conditions referred to in sub-s. 1, but is intended to be, and is in form, a statutory enactment applying to all schools maintained but not provided by the local education authority, and it provides that

WARRINGTON J.
1912
SMITH v. MACNALLY.

the managers are to have the exclusive power of appointing and dismissing teachers, but subject to the powers of the local education authority under the section, and one of those is the power to withhold their consent to the dismissal of a teacher unless that teacher is dismissed on grounds specified in sub-s. 1 (*c*). I think, therefore, that the plaintiff in this case is not merely in the position of a servant who has contracted with a master, and in whose contract it is a term that she shall not be dismissed except upon compliance with certain conditions, but that she has a statutory right to the position she has acquired under the Act unless and until the requirements of the Act with regard to her dismissal have been complied with. Whether they have been complied with or not I will consider presently.

The agreement of 1906 contained rather more elaborate provisions with regard to the conditions requisite to a valid dismissal of a teacher than are contained in s. 7. [His Lordship read clause 6 of the agreement down to the proviso, and continued :] So far those conditions have nothing to do with the Act. I may as well here state that at present no evidence has been given on the part of the managers that the notice to the managers themselves, which is an essential condition of the validity of the dismissal, was in fact given; but I do not rest my judgment on that ground, because there is no evidence either way, and it may be that at the trial, if the action should go to trial, the managers may justify their notice so far as that point is concerned. The agreement then goes on : "Provided always that such notice, except when given solely on grounds connected with the giving of religious instruction in the school, shall not be valid unless the consent of the local education authority has been obtained thereto." That is, it will be observed, substantially the same provision, though put in a different form, as that contained in the Act, except that in the agreement the word "solely" has been introduced.

The next question is, What is the ground in this case on which the managers have purported to dismiss the teacher, and is it, according to the true construction of the section, a ground "connected with the giving of religious instruction in the school"? The defendant Macnally has in an affidavit filed in opposition to

this motion stated what the real ground was throughout. He says that the ground expressed in the first letter that she was a married woman, and that the managers did not desire to retain the services of a married woman, was not the real ground, but that the managers had avoided stating the real ground until they found that they could not obtain her dismissal by any other means. The real ground was this: [His Lordship read paragraphs 4 and 5 of the affidavit above set out, and continued:] I need not read any more. The ground expressed in the first letter was not the real ground. The ground expressed in their final letter, namely, that the managers were not satisfied with the religious instruction given by the plaintiff, was not the real ground. The real ground was that in their opinion she had ceased to be a member of the Church of England or she had proved that she had ceased to be a member of the Church of England. She has, it would appear, attended some services at a Wesleyan chapel, because, as she alleges, the services as conducted at the parish church are not such as she approves of. What that particular reason is is immaterial. She has on certain occasions played the organ at the Wesleyan chapel at the request of the regular organist. Now is that, according to the true construction of the statute and of the agreement, a ground "connected with the giving of religious instruction"? It is really a ground connected with a religious belief and a religious practice of the person in question. In my judgment, in order to render a dismissal without the consent of the local education authority a valid dismissal it is necessary not merely that managers should in their own minds consider that there is a ground for dismissal connected with the giving of religious instruction, but there must, in fact, be such a ground.

Now is the ground alleged in this case a ground "connected with the giving of religious instruction" within the meaning of the statute? In my opinion it is not. I think the Act has, by the expressions it has used, carefully avoided inquiring into the religious belief and the religious practice of a teacher either on the occasion of his or her appointment, or on the occasion of his or her dismissal. On the one hand the consent of the local education authority is required to the appointment of teachers,

WARRINGTON J.
1912
SMITH v. MACNALLY.

and it is provided that that consent shall not be withheld except on educational grounds. That is to say that with regard to the appointment of a teacher it shall not be open to the local education authority to question the appointment on any ground connected with the religious opinion or religious practice of the candidate for the post. It is on educational grounds only that the consent of the local education authority can be withheld.

On the other hand, with regard to the dismissal of teachers, it appears to me that the meaning of the section is that the managers are to be entitled to dismiss a teacher without the consent of the local education authority if they dismiss him on educational grounds; that is to say, on grounds connected with the particular branch and form of education which in the statute is called "the giving of religious instruction."

It seems to me the use of that expression "the giving of religious instruction" is intended to exclude from consideration merely the religious belief or the religious practices of the person in question. It is intended, I think, that the ground for dismissal without the consent of the local education authority shall be really and in truth connected with the giving of the religious instruction. In the present case, as appears from what I have read, it is not pretended that the religious instruction given by the plaintiff was either not efficient or not in accordance with the doctrines of the Church of England. I accept the defendant Macnally's statement as to the real ground, but at the same time I think he had most unwisely been attempting to obtain the dismissal on other grounds. In my judgment, however, the real ground so stated is not a sufficient one for dismissal without the consent of the local education authority. In my opinion, therefore, the notice was invalid, and notwithstanding that notice the plaintiff was entitled to be treated as continuing in her position as a teacher in this school under the statutory provisions as well as under the agreement.

Under these circumstances what ought I to do? The notice expired on November 30. Attempts have been made through the Board of Education and through the local education authority without resorting to the Court to obtain the reinstatement of the plaintiff. Those attempts have failed, and meanwhile, I believe,

though it is not in evidence, steps have been taken to fill up her place by the appointment of a temporary teacher. I am told that I ought to allow things to remain as they are at the present moment, that is, in this condition: that the plaintiff is not a teacher in the school; that she has to depend upon her possible right to recover damages against somebody,—it is not quite clear who the master or employer is whom she might sue,—but it is said I ought to allow that state of things to continue until the trial, when the matter can be more thoroughly threshed out. The object of an interlocutory injunction is to maintain what is sometimes called the status quo, and I think I shall best be maintaining that in this case by granting the injunction asked for. I therefore grant an injunction and make a declaration in the terms of the notice of motion.

Solicitors: *Baker & Nairne; Sharpe, Pritchard & Co., for Becke, Green & Stops, Northampton.*

NOTE.—Education Act, 1902, s. 7:

"(1.) The local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure required for that purpose, other than expenditure for which, under this Act, provision is to be made by the managers; but in the case of a school not provided by them, only so long as the following conditions and provisions are complied with:—

"(*a*) The managers of the school shall carry out any directions of the local education authority as to the secular instruction to be given in the school, including any directions with respect to the number and educational qualifications of the teachers to be employed for such instruction, and for the dismissal of any teacher on educational grounds; and, if the managers fail to carry out any such direction, the local education authority shall, in addition to their other powers, have the power themselves to carry out the direction in question as if they were the managers; but no direction given under this provision shall be such as to interfere with reasonable facilities for religious instruction during school hours;

"(*b*) The local education authority shall have power to inspect the school;

"(*c*) The consent of the local education authority shall be required to the appointment of teachers, but that consent shall not be withheld except on educational grounds; and the consent of the authority shall also be required to the dismissal of a teacher, unless the dismissal be on grounds connected with the giving of religious instruction in the school;

. . . . .

WARRINGTON J.
1912
SMITH v. MACNALLY.

"(5.) In public elementary schools maintained but not provided by the local education authority, assistant teachers and pupil teachers may be appointed, if it is thought fit, without reference to religious creed and denomination . . . .

"(6.) Religious instruction given in a public elementary school not provided by the local education authority shall, as regards its character, be in accordance with the provisions (if any) of the trust deed relating thereto, and shall be under the control of the managers . . . .

"(7.) The managers of a school maintained but not provided by the local education authority shall have all powers of management required for the purpose of carrying out this Act, and shall (subject to the powers of the local education authority under this section) have the exclusive power of appointing and dismissing teachers."

W. I. C.

NEVILLE J.
1912
March 22.

In re LEEMING.
TURNER *v.* LEEMING.

[1911 L. 2559.]

Will—Legacy—Specific Bequest of Shares—Reconstruction of Company—Shares in New Company substituted for Shares in Old Company—Whether Specific Bequest adeemed.

A testator by his will gave his ten 4*l.* fully-paid ordinary shares in a company to N. Between the date of the will and of the death of the testator the company went into voluntary liquidation for the purposes of reconstruction, and as so reconstructed was incorporated in the same name. Under the scheme of reconstruction the testator became entitled to two 5*l.* fully-paid preference shares and two 5*l.* fully-paid ordinary shares in the new company for every 4*l.* ordinary share he held in the old company, but in other respects the new company was substantially the same as the old company:—

Held, that there had been no ademption, and that N. was entitled to the substituted shares in the new company.

ADJOURNED SUMMONS.

John Leeming by his will, dated March 10, 1897, after appointing his wife, Mary Leeming, R. Turner, and another person (who predeceased him) his executors and trustees, and after giving certain specific and pecuniary legacies, gave his real estate and the residue of his personal estate (thereinafter called his trust estate) unto his trustees upon trust for his wife for life, and after her death the testator gave "my ten shares in the Kirkstall Brewery Company Limited" unto the defendant Annie Nelson.

Subject to the bequest of the said shares and of certain pecuniary legacies the testator directed his trustees to stand possessed of his residuary trust estate in trust, in the events which happened, for the children of his brother and sister.

The testator died in March, 1899. His widow, Mary Leeming, survived her co-executor, R. Turner, and died in November, 1910.

At the date of his will the testator was possessed of ten fully-paid ordinary shares of 4*l.* each in the Kirkstall Brewery Company, Limited, and he did not afterwards sell any of his shares or buy any further shares in the company. The company afterwards went into voluntary liquidation for the purpose of reconstruction, and as so reconstructed was incorporated in the same name on January 17, 1899. By such reconstruction the capital of the company was sub-divided, by virtue whereof the holder of every 4*l.* ordinary share in the old company became entitled to two 5*l.* preference shares and two 5*l.* ordinary shares in the new company, fully paid. In consequence of this scheme of sub-division of capital the testator's ten fully-paid shares of 4*l.* each in the old company were converted into twenty 5*l.* ordinary shares and twenty 5*l.* preference shares, fully paid, in the new company, and such last-mentioned shares in fact represented the testator's holding in the old company, and on March 22, 1899, new certificates for such shares were duly issued in the name of the testator, his death not having been then notified to the new company. The company in fact was substantially the same as before its reconstruction.

The summons was issued to determine (amongst other things) whether the gift of the testator's ten shares in the Kirkstall Brewery Company, Limited, to the defendant Annie Nelson had been adeemed, or whether the twenty preference shares and twenty ordinary shares in the new company passed to the defendant Annie Nelson under the gift to her of his ten shares in the Kirkstall Brewery Company.

Bovill, for the plaintiff, the present trustee of the will.

Owen Thompson, for the defendant Annie Nelson. The test is whether the testator at the time of his death had the same

NEVILLE J. 1912 LEEMING, *In re.* TURNER *v.* LEEMING.

thing existing in a different shape, but substantially the same thing: *In re Slater.* (1) It is submitted that under the circumstances the reconstruction was mere machinery for effecting the sub-division of the capital. The new company is substantially the same as the old company and the subject-matter of the bequest remains and is changed in form only. The nearest case to this is *In re Clifford.* (2)

Peterson, K.C., and *Dighton Pollock*, for the defendants Elizabeth and Robert Leeming, two of the residuary legatees. The question is whether the constitution or identity of the old company has changed: *In re Slater.* (1) It is submitted that there has been a change. The new company is a different entity although it has the same name, and its shares are different in denomination and amount. The old company and its shares have ceased to exist, there is no sub-division of its capital as in *In re Clifford* (2), and the bequest is adeemed: *In re Gibson* (3); *In re Gray.* (4)

Stokes, for a party in the same interest.

NEVILLE J. I think that the shares in the new company are really in substance the same as the shares in the old company and represent the specific bequest. The subject-matter of the bequest remains though changed in number and form. They are substantially the same shares. The testator gave "my ten shares in the Kirkstall Brewery Company Limited" to a legatee. There has been a dissolution of that company and a new company has taken its place, but in substance it is the same company. It seems to me that the amount of the testator's interest in the old company remains and is represented by the shares in the new company and is practically the same, and is changed in name and form only. I think, therefore, that there has been no ademption, and that the legatee is entitled to the shares in the new company.

Solicitors: *Gibson & Weldon, for H. J. Thompson & Co., Lancaster; Rawle, Johnstone & Co.; Pearce & Sons.*

(1) [1907] 1 Ch. 665, 672.
(2) Ante, pp. 29, 32.
(3) (1866) L. R. 2 Eq. 669.
(4) (1887) 36 Ch. D. 205.

H. L. F.

RAKUSEN *v.* ELLIS, MUNDAY & CLARKE.

C. A.
1912
March 16, 18, 19.

[1912 R. 390.]

Injunction—Solicitor — Acting against former Client — Confidential Information—Members of same Firm—Discharge of Solicitor—Firm Name.

M. and C. were the only partners in a firm of solicitors named E. M. & C. and were in the habit of doing business separately and without any knowledge of each other's clients. R. consulted M. with reference to an action for wrongful dismissal which he desired to commence against a company. He then changed his solicitors and issued his writ, and the matter was referred to arbitration, the proceedings in which were still in progress. C. was away at the time and knew nothing of the consultations between R. and M., and whilst the arbitration was going on he was appointed under the name of E. M. & C. to act as solicitor for the company in the arbitration. R. applied for an injunction to restrain E. M. & C. from acting for the company:—

Held, that there was no general rule that a solicitor who had acted for some person either before or after the litigation began could in no case act for the opposite side; the Court must be satisfied in each case that mischief would result from his so acting; that there could be no danger of any breach of confidence if C. acted for the company; and (reversing the decision of Warrington J.) that the injunction must be refused.

Decision of Hall V.-C. in *Little* v. *Kingswood Collieries Co.* (1882) 20 Ch. D. 733; 47 L. T. 323, overruled.

Appeal from a decision of Warrington J.

Prior to February, 1910, Samuel Rakusen, the plaintiff, was carrying on business in co-partnership with his brother Hyman Rakusen. In March, 1910, they sold the business to a company called S. & H. Rakusen, Limited. It was alleged by S. Rakusen that it was part of the arrangement that he should be appointed, and he was in fact appointed, sales manager and traveller for the company at a salary of 550*l.* a year. In June, 1911, the company gave him three months' notice to determine his employment. He consulted Mr. Munday, a partner in the defendants' firm of Ellis, Munday & Clarke, solicitors, as to his position, had several interviews with him, and gave him much confidential information in regard to the matters in dispute between him and the company. In October, 1911, he changed his solicitors and

C. A. 1912 — RAKUSEN v. ELLIS, MUNDAY & CLARKE.

issued a writ in an action against the company for wrongful dismissal, and the dispute was referred to arbitration. It was stated that the arbitration was now in progress and five sittings had already been held. In March, 1912, Ellis, Munday & Clarke were appointed solicitors to act for the company in the arbitration proceedings. S. Rakusen thereupon commenced proceedings against Ellis, Munday & Clarke, and now applied for an injunction to restrain them from acting for the company in the arbitration.

Messrs. J. H. Munday and P. Clarke were the only two partners in the firm of Ellis, Munday & Clarke, and the evidence shewed that they were in the habit of doing business separately and without any knowledge of each other's clients, and that each of them had the exclusive services of some of their clerks. Clarke had never seen the plaintiff till March 11, 1912, was away for his vacation at the time when the plaintiff consulted Munday, knew nothing whatever about these consultations, and had never seen any of the papers or proceedings therein. On a previous occasion he had acted as solicitor for one of the shareholders of the company, who asked him to appear for him in the arbitration, and eventually, during the progress of the arbitration, he was asked to act for the company, whose solicitors were unable to give the requisite time and attention to the proceedings. The managing director, secretary, and solicitor of the company in a joint affidavit said that the services of Clarke were required by the company and that no confidential information would be given by him to the company, and that they had not communicated with any member of his firm other than Clarke.

When the case came on before Warrington J. two undertakings were offered by the defendants, namely, an undertaking by Munday in no way to act in the arbitration proceedings or say anything about his consultations with the plaintiff, and further an undertaking that Clarke's name should alone appear on the papers as solicitor for the company, and not the name of the firm. In the Court of Appeal the company offered to undertake not to consult Munday in any way.

Warrington J. held that the principle had been laid down that a solicitor, having once been employed to act for a man, should

not act against him in the same matter; and although there was no imputation of any kind on Messrs. Munday and Clarke and no danger of their doing anything improper, they must be restrained from acting as the company's solicitors in the arbitration proceedings.

Messrs. Munday and Clarke appealed.

W. H. Cozens-Hardy, for the appellants. A solicitor will be restrained from disclosing information confidentially obtained from a client, but there is no general principle that a solicitor who has acted for a client in a particular matter cannot, under any circumstances, act for the opposite party in the same matter: Cordery on Solicitors, 3rd ed. p. 110. It depends on the circumstances of each case. The Court has also to see that the client's choice of a solicitor is not fettered. Here there is no danger of any information obtained by Munday from Rakusen being handed over to Clarke. The existence of such a principle would work great hardship in small towns where there were few solicitors, especially if the retainer of one partner is considered equivalent to the retainer of the firm. The question is whether there is any danger of the disclosure of secrets: *Little* v. *Kingswood Collieries Co.*, per Jessel M.R. (1) Warrington J. relied on *Earl Cholmondeley* v. *Lord Clinton* (2), where the solicitor had discharged himself in the middle of the litigation; explained by Lord Eldon in *Bricheno* v. *Thorp* (3), and in *Beer* v. *Ward.* (4) A case for an injunction must be made out: *Robinson* v. *Mullett* (5); *Johnson* v. *Marriott* (6); *Davies* v. *Clough* (7); *Parratt* v. *Parratt* (8); *Rawlinson* v. *Moss.* (9) No ground has been shewn for restraining the appellants or either of them from acting for the company. They always do business separately, and the fact that a client who instructs a firm is entitled to the services of every member of the firm is not conclusive.

Cave, K.C., and *Harold Simmons*, for Rakusen. There is no

(1) 20 Ch. D. 733, 742; 47 L. T. 323, 325.
(2) (1815) 19 Ves. 261; Coop. G. 80.
(3) (1821) Jac. 300.
(4) (1821) Jac. 77.
(5) (1817) 4 Price, 353.
(6) (1833) 2 Cr. & M. 183.
(7) (1837) 8 Sim. 262.
(8) (1848) 2 De G. & Sm. 258.
(9) (1861) 30 L. J. (Ch.) 797.

C A. 1912 RAKUSEN v. ELLIS, MUNDAY & CLARKE.

personal charge against the appellant firm or any member of it, but we rely on the general principle. The result of the cases is that where a solicitor has acted for a client in any particular matter he cannot subsequently act against him in the same matter, nor can his partner do so. These proceedings are all in the same matter. When a solicitor consents to act for a client he expects to receive his full confidence and learn his secrets, and he is under an implied obligation not to use or put himself in a position to use that confidence to the prejudice of the client. If he agrees to act for a second client that client is also entitled to know all that he as his solicitor knows, and the solicitor is therefore bound not to reveal the secrets of the first client at the same time that it is his duty to tell all he knows to the second client. The Court will take care that its officer does not put himself in such a position. A clerk is in a different position, for there is no contractual relationship between him and the client. We agree that in this case no wrong will be done intentionally, but information may leak out through some of the appellants' clerks, and the principle should be supported. We are not dealing with them as individuals, but as a firm, and we submit that the only safe rule is to forbid such conduct by a firm: *Norton* v. *Cooper*. (1) How can we tell whether undertakings are observed? The fact that the solicitor has discharged himself has no bearing on the rule: *Hutchins* v. *Hutchins* (2); *Biggs* v. *Head*. (3) The judgment in *Earl Cholmondeley* v. *Lord Clinton* (4) was not founded on particular facts, but on a general rule.

No reply was called for.

COZENS-HARDY M.R. It is of vast importance that there should be no doubt thrown on the true position of solicitors in matters of this kind or of the jurisdiction of the Court over solicitors. Solicitors have great privileges and they have corresponding duties. Of their privileges a greater instance cannot be furnished than the absolute privilege which is given to them in the matter of giving evidence of communications which they make to their clients or their clients make to them. We

(1) (1856) 3 Sm. & Giff. 375.
(2) (1825) 1 Hog. 315.
(3) (1837) Sau. & Sc. 335.
(4) 19 Ves. 261; Coop. G. 80.

expect and indeed we exact from solicitors, who are our officers, a higher standard of conduct than we can enforce against those who are not our officers. A solicitor can be restrained as a matter of absolute obligation and as a general principle from disclosing any secrets which are confidentially reposed in him. In that respect it does not very much differ from the position of any confidential agent who is employed by a principal. But in the present case we have to consider something further. It is said that in addition to the absolute obligation not to disclose secrets there is a general principle that a solicitor who has acted in a particular matter, whether before or after litigation has commenced, cannot act for the opposite party under any circumstances; and it is said that that is so much a general rule and the danger is such that the Court ought not to have regard to the special circumstances of the case.

I do not doubt for a moment that the circumstances may be such that a solicitor ought not to be allowed to put himself in such a position that, human nature being what it is, he cannot clear his mind from the information which he has confidentially obtained from his former client; but in my view we must treat each of these cases, not as a matter of form, not as a matter to be decided on the mere proof of a former acting for a client, but as a matter of substance, before we allow the special jurisdiction over solicitors to be invoked, we must be satisfied that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act.

Let me take the circumstances of the present case. There was a dispute between the plaintiff, Mr. Rakusen, and the company as to whether he had been wrongfully dismissed. The firm of Ellis, Munday & Clarke were consulted by Mr. Rakusen on that point. The services of the firm were dispensed with some day in October last. I have seen the bill of costs which was rendered by the firm and which has been wholly or partially paid. It is quite clear that there was some confidential information furnished by Mr. Rakusen to the member of the firm, Mr. Munday, who, and who alone, was consulted in the matter; and if this had been a case of Mr. Munday having obtained from the plaintiff, who said that he had been wrongfully dismissed, confidential

C. A. 1912 — RAKUSEN v. ELLIS, MUNDAY & CLARKE. — Cozens-Hardy M.R.

information bearing upon the circumstances or the alleged justification of the wrongful dismissal, and if it had been a case of Mr. Munday afterwards appearing in the action for the defendants, speaking for myself, I should have said that that was a case in which he was putting himself in a position in which he could not as an honest man discharge his duty to the defendants without consciously or unconsciously availing himself of information which he had obtained while acting for Mr. Rakusen. That would be a typical case in which a person ought not to be allowed to put himself in a position in which he could not clear his mind from the knowledge he had obtained. I cannot bring myself to doubt that any respectable solicitor would in those circumstances have said at once, "I am very sorry I cannot act for you because I am familiar with the circumstances alleged by the other side, which circumstances have been communicated to me confidentially." But what are the facts here? The communications all took place with Mr. Munday. At that time Mr. Clarke was away for his vacation out of the country and he knew nothing about it. He had never seen Mr. Rakusen. He had not had any communication with him, and was really a complete stranger to the matter. Before the writ was issued, Messrs. Ellis, Munday & Clarke had ceased to be solicitors for Mr. Rakusen, and in those circumstances is there any reason why Mr. Clarke, who was allowed to watch and attend proceedings in the arbitration (for I ought to say the action was referred to arbitration) and was allowed to attend on behalf of a shareholder before the arbitrator for some days—is there any reason why he should not be allowed to act as and to appear as solicitor for the company? In my opinion there is no substance whatever in the objection. There is no prejudice, there is no mischief, and having regard to the undertaking which was offered that although the solicitors on the record for the company are now Ellis, Munday & Clarke that should be changed and Mr. Clarke should alone be the solicitor on the record, I can see no ground for granting the injunction.

But it is right that I should say a few words upon the authorities which have been cited to us. It has been said "this is settled law since Lord Eldon's time in *Earl*

Cholmondeley v. *Lord Clinton*."(1) I have read and re-read that case, and in my opinion it lays down no such principle. It was, as explained by Lord Eldon in a subsequent case, *Brickeno* v. *Thorp* (2), a case in which a solicitor, one of the members of the firm, in the middle of a litigation discharged himself and went over to the other side. It was a question of breach of contract and not merely a breach of duty, and Lord Eldon and the judges he consulted really decided that case on a ground which is not now treated by counsel on either side, and I think is properly not treated by them, as conclusive of the matter. Lord Eldon proceeded on the footing that the solicitor could not by discharging himself in the middle of a suit deprive the client of the right which he had by the contract of retainer to the services of that solicitor.

Now our attention has been called to other cases. There is the case in the Exchequer of *Johnson* v. *Marriott* (3), which is absolutely inconsistent with the general rule which has been relied upon. There the Court of Exchequer declined to discharge a rule which had been obtained for a change of solicitors from one side to the other on the ground that there was no evidence shewn of any material circumstances which would justify it. But then it is said Hall V.-C. in *Little* v. *Kingswood Collieries Co.* (4) has laid down some principles which are sound in law and which ought to govern the Court. No doubt Hall V.-C. did lay down some principles, particularly in one passage I will read, which require consideration: "where the second transaction flows out of the first, and from the nature of the dispute, is so connected with it as I consider this to be, the new client ought not to employ that particular solicitor in the transaction, and the solicitor ought not to accept the employment, and the case is then one in which at the instance of the former client the solicitor ought upon general principles of equity to be restrained from so acting." Hall V.-C. seems to have thought that the mere fact that the solicitor had once advised or acted in an early stage of the same matter ought to prevent him from ever acting for the other side quite irrespective of the circumstances of the

(1) 19 Ves. 261; Coop. G. 80.
(2) Jac. 300.
(3) 2 Cr. & M. 183.
(4) 20 Ch. D. 733, 740; 47 L. T. 323.

C. A. 1912 — RAKUSEN v. ELLIS, MUNDAY & CLARKE. — Cozens-Hardy M.R.

case. That case went to the Court of Appeal, and although the decision was not formally overruled, the view of the Vice-Chancellor was obviously not adopted by the Court of Appeal, for the appellant's counsel were stopped at a certain stage of the argument and counsel for the respondent were heard for the plaintiff, and the Court then suggested a compromise. Jessel M.R. said (1) he thought the order of Hall V.-C. went further than any previous case, even than the cases in Ireland, to two of which cases our attention has been called. Then "his Lordship intimated that, although there was no law that, because a solicitor had acted for a person, he might not afterwards act against him, it was not to be supposed that he was at liberty to disclose the secrets of his former client to his opponent in the subsequent proceedings, and that the Court could always, on general principles, restrain a solicitor who threatened to disclose secrets." The Court of Appeal there laid down a distinction between an absolute duty not to disclose secrets and a duty which is not absolute but dependent on circumstances, namely, a duty not to act for an opposite party in the same litigation. The Court went further, they sanctioned a compromise, indeed they suggested a compromise, under which the solicitor was to continue to act in the litigation contrary to the injunction which was granted by Hall V.-C. I therefore think his decision is not an authority binding on this Court on the point. There is such an intimation of opinion as to render it easy for me to say, as I do say, that I think the judgment of Hall V.-C. went further than can be warranted either on principle or on authority, and that it ought not to be followed.

In my opinion, without going through the other authorities to which our attention has been called, the injunction granted by Warrington J. must be discharged; but I do not wish quite to leave it there. Warrington J. has said, and it has been admitted on both sides here, that we are dealing with solicitors of the highest position and whose honour and integrity are beyond any imputation. No possibility of the disclosure of secrets has ever been suggested, but Warrington J. merely bases his judgment on this, that it has been frequently said in this Court that a solicitor

(1) 47 L. T. 323, 325.

is an officer of the Court and cannot be allowed to put himself into a position in which his duty to his present client may conflict with his duty to his past client. With great respect to Warrington J. I think that goes a great deal too far. Many busy solicitors in this country would find it impossible to carry on their business at all if that was the true rule. I think solicitors of the highest honour and integrity may frequently be perfectly able to act in the same matter for a new client, and at the same time may be perfectly able to avoid disclosing secrets without putting any strain upon their memory, conscience, or integrity.

In my opinion the order of Warrington J. must be discharged and this appeal should be allowed.

FLETCHER MOULTON L.J. I am of the same opinion. Before dealing with the case before us I wish to say a few words upon the rights of the parties and the action of the Courts in cases in which there is no question of solicitor and client but in which the feature of confidential relationship is to be found. In almost all businesses there must be persons in such a confidential relation to the employers or to the people who are employed by them for purposes connected with the business, that the knowledge which they acquire is not knowledge at their own disposal but consists substantially of the secrets of their employer. Such employments come to an end sometimes at the choice of the master, sometimes at the choice of the servant, and thereupon difficulties necessarily arise, because the person who is no longer in employment still has in his breast secrets which are the property of his past employer. The view that the law takes of the rights of the parties in that position is too clear to be disputed. The employee is quite free to go into the service of people who may be the rivals or the opponents of his former master. The law does not say that the possession of those secrets shall cripple his work, or sterilize it. He may go into employment quite inconsistent with the employment which he had in the past. All that the law says is: You shall not disclose or put at the service of your new employer the secrets that belong to your old employer.

C. A.
1912
RAKUSEN
v.
ELLIS,
MUNDAY
& CLARKE.
Fletcher
Moulton L.J.

Now we come to the special case of the employment of a solicitor by a client. In my opinion the fundamental principle remains the same as in other cases of confidential employment, and I accept with regard to this the dictum (because it was not embodied in a formal judgment) of Jessel M.R. when he says (1) "that, although there was no law that, because a solicitor had acted for a person, he might not afterwards act against him, it was not to be supposed that he was at liberty to disclose the secrets of his former client to his opponent in the subsequent proceedings, and that the Court could always, on general principles, restrain a solicitor who threatened to disclose secrets." That is the law with regard to all confidential employment, and it applies therefore to confidential employment of a solicitor by a client. But although the fundamental law is not different its application is widely different in degree, and for two reasons. In the first place the degree of the confidential character of the relation between the client and his solicitor and of the communications made by the client to the solicitor is in the eyes of the law the very highest— so high that the solicitor is absolutely privileged and cannot be made to state what passed between him and his client. To that extent the solicitor is made, as it were, a part of his client for the purposes of those communications. The second reason is that the Court is not bound to accept in that case the standard of sensibility which it may feel is all that it can enforce on people in general who are in confidential relations one with the other. It can fix a standard for the behaviour of its own officers which is higher than it would be practicable to exact from persons in other types of confidential relations. I think, therefore, that in deciding the question of what the action of a solicitor may be, although the Court does not start fundamentally from a different rule, the decisions it gives may be different in many cases from the decisions which it would give were it appealed to in an action between persons who were not in the position of solicitor and client but nevertheless had been in contractual relations involving confidential communications. That being my view of the law, one thing becomes clear. The Court must act in each case according to the circumstances of the case. If there is a

(1) 47 L. T. 323, 325.

distinction between the solicitor and other persons confidentially employed it is one of degree based on one of those two considerations that I have mentioned, and the moment that it is agreed that it is one of degree it means that we must look at the facts of the case and apply to them the fundamental principles of the law modified by those considerations.

As a general rule the Court will not interfere unless there be a case where mischief is rightly anticipated. I do not say that it is necessary to prove that there will be mischief, because that is a thing which you cannot prove, but where there is such a probability of mischief that the Court feels that, in its duty as holding the balance between the high standard of behaviour which it requires of its officers and the practical necessities of life, it ought to interfere and say that a solicitor shall not act. Now in the present case there is an absolute absence of any reasonable probability of any mischief whatever. It is an attempt to induce the Court to move, on the most purely technical grounds, in a matter in which it ought to deal with realities. The client consulted Mr. Munday only and nobody acquired any knowledge of any communication confidential or otherwise to Mr. Munday other than that gentleman himself. Mr. Clarke, his partner, was away at the time, and it is admitted that he did not even know that Mr. Munday had been consulted, and a fortiori knew nothing whatever of the communications which were made to him, and he is willing to undertake not to make any inquiries or obtain any information from his partner with regard to the matter. Nobody pretends that this gentleman will not act up to that undertaking, and if we were to say that he—not his firm, but that he—was not to act, in my opinion we should be abusing the power that we certainly possess of directing what the officers of the Court should and should not do. For these reasons, though I think that it was a mistake to suggest that the name of the firm should formally appear on the proceedings as the solicitors of the company, I see no reason whatever why Mr. Clarke should not act for them, and I am satisfied that no mischief whatever will come from it.

I do not intend to deal at length with the authorities that have been cited. But I wish to point out that the decision in

C. A. 1912 — RAKUSEN v. ELLIS, MUNDAY & CLARKE. — Fletcher Moulton L.J.

Earl Cholmondeley v. *Lord Clinton* (1) must be read with the authoritative explanations of it which were given by the Lord Chancellor in *Beer* v. *Ward* (2) and *Bricheno* v. *Thorp* (3), and as so read, in my opinion, it will not have the effect which was given to it by the learned judge in the Court below. With regard to *Hutchins* v. *Hutchins* (4), one of the Irish cases, I think that the decision in that case is based on a misunderstanding of the decision in *Earl Cholmondeley* v. *Lord Clinton* (1), and with regard to *Biggs* v. *Head* (5) it is quite clear there there had already been, in the opinion of the Court, a breach of the confidential relations.

For these reasons I think the appeal ought to be allowed.

BUCKLEY L.J. There is a general principle, applicable not to solicitors only but to confidential agents of all kinds, that confidential information shall not be used against the principal from whom, or for whom, and in whose employment, it has been obtained. There is no general rule that a solicitor who has acted in a particular matter for one party shall not under any circumstances subsequently act in that matter for his opponent. Whether he will be restrained from so acting or not depends on the particular circumstances. Of course he will be restrained from communicating confidential information, but the respondents contend that when there is no danger of this happening the solicitor will still be restrained from acting. Further they maintain a still larger proposition and assert that this extends to the partner (who knows nothing of the matter) of the solicitor who from his previous employment does know something.

In my opinion neither of these propositions can be maintained. In some of these cases the injunction sought has been an injunction to restrain the new client from employing the solicitor and an injunction to restrain the solicitor from acting. In the present case the injunction is asked only against the solicitor, but it must not be forgotten that such an injunction if granted has just the same effect so far as the client is concerned as if the

(1) 19 Ves. 261; Coop. G. 80.
(2) Jac. 77.
(3) Jac. 300.
(4) 1 Hog. 315.
(5) Sau. & Sc. 335.

injunction were granted against him also. He cannot obtain the services of that solicitor. The question then involves the consideration of the circumstances under which a client is to be prevented from obtaining the services of a particular solicitor. The circumstances I think are these: the jurisdiction is a jurisdiction to restrain the solicitor from giving the new client any assistance against the old client by reason of knowledge acquired as solicitor for the old client. If to ensure that result it is shewn to be reasonably necessary to restrain the employment of the solicitor by the new client the injunction will be granted, but on no other ground could such an injunction be granted as against the client.

Mr. Cave has asserted this general principle, which he says is to be found in the authorities—that when a solicitor has acted for a client in a particular matter he, or his partners, cannot act against that client in anything relating to that matter, and that this is true irrespective of the particular circumstances of the case. I am of opinion that there is no such principle. There is no law that because a solicitor has acted for a person he may not afterwards act against him in the same matter. It depends on circumstances whether he shall be allowed to act or not. The learned judge from whom this appeal is brought has said: "It has been frequently said in this Court that a solicitor as an officer of the Court cannot be allowed to put himself into a position in which his duty to his present client may conflict with his duty to his past client; and I think the principle which has been laid down by the Courts is that in such a case as that the Court does not inquire what information the solicitor may have or what information he may communicate. He is presumed to have been in confidential relationship with his client and he will not be allowed to put himself into confidential relationship with another client opposed to his first client." With great deference to the learned judge I think that is erroneous in point of law.

The cases I think have established this, that as between the Court and the solicitor who is the officer of the Court there is the most ample jurisdiction to restrain any mischief resulting from the communication of confidential information obtained in the employment of one man to his detriment in the employment of

C. A. 1912 RAKUSEN v. ELLIS, MUNDAY & CLARKE. Buckley L.J.

another man. As regards *Earl Cholmondeley* v. *Lord Clinton* (1), I think the best summary of the result of that case is to be found in Lord Eldon's own statement of it in *Bricheno* v. *Thorp* (2) that "the case of *Earl Cholmondeley* v. *Lord Clinton* (1) was no more than this. A gentleman discharged himself from being solicitor for Lord Clinton, and the question was, whether the Court would permit him to turn his back on his client, and to go into the service of the person against whom he had been employed." When *Earl Cholmondeley* v. *Lord Clinton* (1) is carefully read it will be found that Lord Eldon and the judges whom he consulted were all basing themselves upon this as being in their opinion the one cardinal feature of that case, that the solicitor had discharged himself; and they, I think, drew the inference that having discharged himself he was going into the employment of the new client with the result, or the possible result, or the anticipated result, that there would be a breach of the confidential duties which he owed to his former client. Of course he owes his former client the duty not to disclose that which he has learned confidentially, but there is no duty in the solicitor to abstain from serving another client in that matter if there is no breach of that confidence.

The only other case to which I wish to refer is *Little* v. *Kingswood Collieries Co.* (3) It seems to me that the principles upon which Hall V.-C. there purported to act were so shaken by that which was decided in the Court of Appeal that the judgment of Hall V.-C. cannot be relied upon. It will be noticed that the case gives a final blow to any such doctrine as Mr. Cave propounded, that the solicitor cannot act under any circumstances because there the Court approved a compromise under which he was, under circumstances, to act. That therefore cannot be improper and wrong. It seems to me, from the fact that the appellants' counsel were stopped, from the observations which were made, although made to some extent in the course of the argument, and from the compromise which the Court approved, plainly to follow that the principles for which Mr. Cave has argued here are principles which cannot be maintained. I may

(1) 19 Ves. 261; Coop. G. 80. (2) Jac. 300, 301.
(3) 20 Ch. D. 733; 47 L. T. 323.

add that the question whether the solicitor was discharged or has discharged himself is not a governing or even a material question, except so far as it may throw light upon the question whether confidence is likely to be abused.

There is only one further matter which I wish to mention. The learned judge was proceeding on this footing, and we are proceeding on this footing, that in this case danger of communication of secrets will not arise. Those are the learned judge's words. In that state of facts it appears to me that an injunction is impossible. The whole basis of the jurisdiction to grant the injunction is that there exists, or, I will add, may exist, or may be reasonably anticipated to exist, a danger of a breach of that which is a duty, an enforceable duty, namely, the duty not to communicate confidential information; but directly the existence or possible existence of any such danger is negatived, the whole basis and substructure of the possibility of injunction is gone. I think that the order ought to be discharged.

Appeal allowed.

NOTE. No undertaking was in fact directed either by Warrington J. or by the Court of Appeal, but Mr. Clarke's name was at once substituted for that of the firm as solicitor for the company.

Solicitors: *Ellis, Munday & Clarke; B. A. Woolf & Co.*

H. C. R.

C. A.
1912
March 5, 6;
April 1.

BRISTOL GUARDIANS *v.* BRISTOL WATERWORKS COMPANY.

[1910 G. 869.]

Water Company—Workhouse—Supply of Water for Domestic Purposes—"Private dwelling-house"—Bristol Waterworks Act, 1862 (25 & 26 *Vict. c. xxx.*), *ss.* 68, 73—*Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *s.* 53.

A water company by s. 68 of its special Act (which incorporated the Waterworks Clauses Act, 1847) was required at the request of the owner or occupier to furnish to every occupier of a "private dwelling-house" or part of a dwelling-house within the limits of its Act a supply of water for the domestic use of the occupier at water rents based on the rental value of the premises. By s. 53 of the Waterworks Clauses Act, 1847, every owner and occupier of any "dwelling-house" or part of a dwelling-house within the limits of the special Act was, on complying with certain conditions, to be entitled to demand and receive from the undertakers a sufficient supply of water for domestic purposes.

The guardians of the poor of the parish of B. as the owners and occupiers of certain workhouses, offices, and homes for children within the limits of the company's special Act claimed a supply of water for domestic purposes at the rents prescribed by s. 68 of the special Act:—

Held (Fletcher Moulton L.J. dissenting), that the general Act of 1847 must be read subject to the provisions of the special Act, and that the right to demand and the obligation to supply water for domestic purposes to dwelling-houses under s. 53 of the Act of 1847 were limited by s. 68 of the special Act to private dwelling-houses.

Held, also (Fletcher Moulton L.J. expressing no opinion on the point), that a workhouse was not a "private dwelling-house" within the meaning of s. 68 of the special Act.

Held, therefore, that the claim of the guardians failed.

Principles of construction to be applied to private Acts relating to waterworks and to similar undertakings stated by Fletcher Moulton L.J.

Decision of Eve J., ante, p. 111, affirmed.

Appeal from a decision of Eve J. (1)

The plaintiffs were the guardians of the poor of the parish of Bristol.

The defendant company were incorporated to supply the inhabitants of Bristol with water, by and under the Bristol Waterworks Act, 1846 (9 & 10 Vict. c. ccxxii.), and subsequent

(1) Ante, p. 111.

Acts, including the Bristol Waterworks Act, 1862 (25 & 26 Vict. c. xxx.), the Bristol Waterworks Amendment Act, 1865 (28 & 29 Vict. c. xxvi.), and the Bristol Waterworks Act, 1902 (2 Edw. 7, c. cxxx.).

For many years past the plaintiffs as owners and occupiers of certain workhouses and homes for the reception of pauper children, and of St. Peter's Hospital (which was used for offices and committee rooms and residence of caretaker), in the city of Bristol, had obtained from the defendant company a supply of water for the use of the officers and inmates of their premises for both domestic and non-domestic purposes, paying for it by agreement by meter at a uniform rate of 1*s.* per 1000 gallons.

The plaintiffs' premises were within the limits of the defendant company's Acts.

On or about September 28, 1910, the plaintiffs requested the defendant company to furnish them, for the ensuing quarter, with water for the domestic use of the officers and inmates of the premises to be paid for at water rents as specified in s. 68 of the Act of 1862 (1), instead of as theretofore by meter. They proposed making their domestic supply distinct from that for non-domestic purposes. They accompanied their request with a tender of a sum calculated to be the amount of the water rents in accordance with s. 68.

The defendant company declined to accept the tender, and refused to supply the plaintiffs with water for domestic purposes except on the terms of it being paid for by measure. They denied the right of the plaintiffs, upon the true construction of the Acts, to be supplied with any water at water rents.

The plaintiffs thereupon commenced this action claiming a

(1) The Bristol Waterworks Act, 1862, s. 4, enacted that the Waterworks Clauses Act, 1847 ("except where otherwise specially provided by this Act") was incorporated therewith.

Sect. 68: "The company shall, at the request of the owner or occupier, furnish to every occupier of a private dwelling-house or part of a private dwelling-house in any public street or road within the limits of this Act in which or within one hundred yards of which any main pipe of the company shall be laid, a sufficient supply of water for the domestic use of every such occupier at annual rents or prices (hereinafter called 'water rents') not exceeding" the sums specified which were based on the rental value of the premises.

C. A. 1912 — BRISTOL GUARDIANS v. BRISTOL WATER-WORKS COMPANY.

declaration that they were entitled to be furnished by the defendant company, in accordance with the Act of 1862 and the Acts incorporated therewith, with a proper and sufficient supply of water (separate from any supply by meter for non-domestic purposes) for domestic purposes to their premises (Eastville Workhouse and master's house thereto, Stapleton Workhouse and casual wards thereat, St. Peter's Hospital, children's homes at Fishponds, and Southmead Workhouse); and that the defendant company were bound to supply such water at the water rents prescribed by s. 68 of the Act of 1862.

Eve J. held that the Waterworks Clauses Act, 1847, must be read subject to the provisions of the special Act of 1862; that the right to demand and the obligation to supply water for domestic purposes to dwelling-houses under s. 53 of the general Act of 1847 were limited by ss. 68 and 73 of the special Act of 1862 to "private dwelling-houses"; and that a workhouse was not a "private dwelling-house" within the latter sections. He accordingly dismissed the action with costs.

The plaintiffs appealed.

March 5, 6. *Danckwerts, K.C.*, and *E. H. C. Wethered*, for the plaintiffs. The plaintiffs are entitled to this supply of water for domestic purposes under the Act of 1862, and a fortiori under the Act of 1865. The question of domestic or non-domestic purposes has been settled by *Colley's Patents, Ld.* v. *Metropolitan Water Board.* (1) It must be answered not with reference to premises upon which the user takes place, but with reference to the purpose for which the user is made. By the Waterworks Clauses Act, 1847, s. 35, a constant supply for domestic purposes is to be provided. By s. 53 (2) every owner and occupier of any dwelling-house who has laid communication pipes and tendered the water rate as provided by s. 68 is entitled to a sufficient supply of water

(1) [1912] A. C. 24.

(2) The Waterworks Clauses Act, 1847, s. 53, enacts: "Every owner and occupier of any dwelling-house or part of a dwelling-house within the limits of the special Act shall, when he has laid such communication pipes as aforesaid, and paid or tendered the water rate payable in respect thereof, according to the provisions of this and the special Act, be entitled to demand and receive from the undertakers a sufficient supply of water for his domestic purposes."

for his domestic purposes: *South-West Suburban Water Co.* v. *St. Marylebone Union.* (1) A workhouse is a dwelling-house within the Act: *Chester Waterworks Co.* v. *Chester Union.* (2) The supply of water for domestic purposes is compulsory; the supply of water for trade purposes is voluntary and must be taken separately. A supply for other purposes is provided for by the Waterworks Clauses Act, 1863, ss. 12, 13, 14. The water is not to be used for other purposes: s. 18. The defendant company are a company incorporated under a special Act of 1846 and subsequent Acts, including the Bristol Waterworks Act, 1862, and the Bristol Waterworks Amendment Act, 1865. Sect. 4 of the Act of 1862 incorporates the general Act of 1847. By s. 68 the supply of water is to be to every occupier of a "private dwelling-house." It is submitted that a workhouse is a "private dwelling-house" within that section; the word "private" does not add any force to the word "dwelling-house." Sect. 71 provides that water supplied for domestic purposes shall not be used in other specified ways; and s. 92 states the penalties for doing so. Sect. 73 of the private Act of 1862, which gives power to supply by meter, is in terms limited to supply for other than domestic purposes. There is accordingly no power to supply water for domestic purposes to any but private dwelling-houses; so all dwelling-houses must be included in that term, for s. 53 of the Act of 1847 says that every occupier of a dwelling-house is entitled to a supply of water for domestic purposes. Workhouses are homes for the paupers and "private dwelling-houses" of the guardians: *Cooke* v. *New River Co.* (3); *South-West Suburban Water Co.* v. *St. Marylebone Union* (4); *Liskeard Union* v. *Liskeard Waterworks Co.* (5); *Chester Waterworks Co.* v. *Chester Union.* (2) The admission of casual paupers is regulated by the General Order of the Local Government Board of December 18, 1882.

The word "private" is dropped in the Bristol Waterworks Amendment Act, 1865, ss. 26, 32, which shews that a "dwelling-house" is the same thing as a "private dwelling-house":

(1) [1904] 2 K. B. 174.
(2) (1908) 98 L. T. 701.
(3) (1888) 38 Ch. D. 56, 63.
(4) [1904] 2 K. B. 179.
(5) (1881) 7 Q. B. D. 505.

C. A. 1912

BRISTOL GUARDIANS v. BRISTOL WATER-WORKS COMPANY.

Airdrie, Coatbridge and District Water Trustees v. *Flanagan.* (1) Sects. 31 and 32 of the Bristol Waterworks Act, 1902, are consistent with our contention that this workhouse is entitled to a supply of water for domestic purposes at a rate based on the rental and that separate supplies will be necessary. [They also referred to *Stockton and Darlington Ry. Co.* v. *Barrett* (2) and *Metropolitan Water Board* v. *New River Co.* (3)]

Upjohn, K.C., and *D. M. Kerly*, for the defendant company. The word "private" must have effect given to it, and a workhouse is not a private dwelling-house. Any pauper may apply for admission and on entering his liberty is restricted. The conditions are quite unlike those of a private dwelling-house. It is in fact the public dwelling-house in the district. The defendant company's first Act was passed in 1846 and it contains the expression "private dwelling-house." The word "private" in s. 68 of the Act of 1862 must be construed in its ordinary and natural sense, and if in a particular instance that construction works a hardship it is for the Legislature and not the Court to provide a remedy: *Miller* v. *Salomons.* (4)

[COZENS-HARDY M.R. Do you say that s. 48 of the Waterworks Clauses Act, 1847, is incorporated in your special Act?]

There is no section corresponding to s. 48 in the Act of 1862. If s. 48 is incorporated it applies only to owners and occupiers of private dwelling-houses. The difficulty as to dwelling-houses not situated in a public street was recognized in s. 21 of the Bristol Waterworks Act, 1882 (45 & 46 Vict. c. clxxv.).

[COZENS-HARDY M.R. Sect. 73 is the section of the Act of 1847 which is not found in your Act.]

If it is objected that the construction we are submitting limits the class of persons who are entitled to a supply, it is submitted that the effect of the construction contended for by the other side would be to unduly extend the powers of the defendant company to the detriment of the public. If the plaintiffs succeed the defendant company would be in a position to say that the supply for domestic purposes must always be paid for at a rate calculated on the rateable value of the property in addition

(1) (1906) 43 S. L. R. 422.
(2) (1844) 11 Cl. & F. 590.
(3) (1904) 20 Times L. R. 687.
(4) (1852) 21 L. J. (Ex.) 161.

to the special charge for other purposes. That would not be in favour of the public, but would be a serious tax on it. It would double the income of the defendant company.

If the Court departs from the ordinary meaning of the word "private" it is difficult to see where it could stop. In *Airdrie, Coatbridge and District Water Trustees* v. *Flanagan* (1) the meaning of the expression "private dwelling-house" in a section of an Act practically the same as s. 68 was explained, and it was held not to include a public-house; and under the Public Health (London) Act, 1891, s. 24, the expression was held not to include a block of residential flats—*Queen Anne Residential Mansions and Hotel Co.* v. *Westminster Corporation* (2)—nor a club: *McNair* v. *Baker*. (3)

It is submitted that there is no real change of language in the following section, s. 69, where the expression used is "dwelling-house." That section merely refers back to s. 68.

Sect. 73 provides for the supply by agreement of water for other than domestic purposes, that is, other than the domestic purposes mentioned in s. 68, which are domestic purposes in a "private dwelling-house." Inasmuch, therefore, as under s. 68 a consumer is bound to pay a water rate irrespective of the quantity of water he consumes, so the defendant company are bound not to sell to other persons in such a way as to prevent the consumer who pays a water rate from receiving a full and adequate supply. Sect. 73 relates to a supply for every purpose which is not provided for by s. 68, and it imports the overriding proviso that the defendant company must not by providing water by agreement affect their power to supply it under s. 68.

Then as to the point as to ultra vires. The defendant company have ample powers within the limits of their Acts to sell water to any persons they please provided that they retain sufficient to enable them to discharge their primary obligation to supply under s. 68. The reasonable way of construing s. 73 is, it is submitted, to read "domestic purposes" as meaning those purposes which are mentioned in s. 68. The right of the occupier who pays water rate under s. 68 is, so to speak, to

(1) 43 S. L. R. 422, 427. (2) (1901) 46 Sol. J. 70.
(3) [1904] 1 K. B. 208, 212.

C. A. 1912

BRISTOL GUARDIANS v. BRISTOL WATER-WORKS COMPANY.

have a first charge on the undertaking of the defendant company.

The defendant company were incorporated by the Act of 1846 as a trading company for the purpose of selling their water, and that power is preserved by their subsequent Acts. The business of selling water was therefore reasonably incidental to their business as authorized by their special Act: *Attorney-General* v. *Mersey Ry. Co.* (1) The purpose of the incorporation of the defendant company, as shewn by the preamble and s. 4 of the Act of 1846, was that of supplying with water all the inhabitants within the limits of the Act, and that purpose remained unaffected notwithstanding the repeal of that Act: Act of 1862, preamble and ss. 3, 66. It would be impossible to say that it would be ultra vires for the defendant company to supply water for the sanitary purposes of a small railway station which did not fall within the description of a "private dwelling-house." Sects. 75 and 76, which provide for a supply by meter, do not throw much light on the subject. Domestic purposes mean domestic purposes in respect of which a water rate is paid. Alternatively the defendant company obtain their power to contract for a supply of water for other than domestic purposes from s. 73 of the Act of 1862, which is taken from s. 91 of the repealed Act of 1846. Sects. 89, 90, and 91 of the Act of 1862 afford no assistance, and the true construction of the Act of 1862 is, it is submitted, that it gives a right to a limited class of the inhabitants to demand a supply, and as to the rest of the inhabitants it leaves the defendant company to contract with them for a supply, but that the Legislature intended that the whole of the inhabitants should have a first charge for domestic purposes. Sect. 73 means that the defendant company are to be entitled to deal with their surplus water after they have supplied the whole of their district with water for domestic purposes.

The defendant company's subsequent special Acts can only be material in so far as they alter or declare the true construction of the Act of 1862. The Act of 1902 by s. 31 shews that where the Legislature intended to alter the Act of 1862 it makes its meaning clear. Sect. 32 is more puzzling. It deals with the

(1) [1907] A. C. 415, 417.

case of a supply to a "dwelling-house" used partly as a dwelling-house and partly for trade purposes. It is too obscure to give any assistance and certainly shews no intention to impose any general obligation to supply dwelling-houses. The case here is not under that section. It is contended by the other side that s. 32 is a legislative construction of the expression "private dwelling-house" in s. 68 of the Act of 1862, as meaning "dwelling-house." It is submitted, however, that s. 32 uses the expression "dwelling-house" in a generic sense as meaning a house consisting of two parts, the one part used as a private dwelling-house, and the other part used for trade purposes. But this is quite consistent with the whole of the premises being used as a "private dwelling-house." The object of the section was to entitle the consumer to a supply to his premises as an entirety for use for any purposes he liked whether domestic or trade. The whole of the premises above a shop may be a private dwelling-house. The only object in discussing s. 32 is to endeavour to ascertain, first, whether it has altered s. 68 of the Act of 1862, and it is clear that it has not done so, and, secondly, whether it has imposed a statutory construction on that section, and that it is submitted it has not done. It would be a very dangerous thing to construe an Act of 1862 by an obscure section in an Act passed thirty years afterwards.

Then as to the Waterworks Clauses Act, 1847. The preamble to the Act shews what are its true functions. The only sections having any bearing on the present case are ss. 35, 48, 53, and 68. If s. 53 of that Act be placed side by side with s. 68 of the Act of 1862, it will be seen that the two sections cover the same ground and are in pari materia. Under each section the right is given to the owner of a dwelling-house to demand a sufficient supply for his house and a corresponding obligation is imposed on the defendant company to afford one. Sect. 53 assumes that the person entitled to the supply will pay the water rate provided by s. 68. Sect. 48 of the Act of 1847 also assumes that there will be a water rate payable in respect of the premises supplied. In s. 68 the same fact is assumed. The section has nothing to do with the right, but only with the remedy. Sects. 53 and 68 taken together mean that the occupier can demand and that the

C. A. 1912

BRISTOL GUARDIANS v. BRISTOL WATER-WORKS COMPANY.

defendant company shall supply at a price. Sect. 70 provides that the rates shall be paid in advance.

As to the cases relied upon by the plaintiffs. In *Liskeard Union* v. *Liskeard Waterworks Co.* (1) the expression used in the charging section was "house." In *Cooke* v. *New River Co.* (2) and *South-West Suburban Water Co.* v. *St. Marylebone Union* (3) the expression used was "dwelling-house." Those cases decide that in many private Acts the expression "house" or "dwelling-house" extends to any building in which persons abide, stay, or dwell for any time however short and for whom a supply of water is required for purposes which are termed domestic. In the case of a "dwelling-house" the test as to whether a supply of water for domestic purposes can be required is the character of the user and not that of the premises. In the case, however, of a "private dwelling-house" the test is different, and what has to be regarded is the character of the premises and not that of the user.

Danckwerts, K.C., in reply. There is a well-known distinction between a statutory company, like the defendant company, and a common law corporation. A statutory company can only do what it is expressly authorized to do, whereas a common law corporation can do anything except what it is prohibited from doing: *Ashbury Railway Carriage and Iron Co.* v. *Riche* (4); *London County Council* v. *Attorney-General.* (5) There is nothing in the Act of 1862 which authorizes the defendant company to supply water for domestic purposes except to the limited class mentioned in s. 68.

The obligation to supply water is derived from s. 53 of the Act of 1847, which is incorporated in the special Act of 1862.

Charging clauses are to be taken strongly against the company obtaining them and liberally in favour of the public: *Stockton and Darlington Ry. Co.* v. *Barrett* (6); *Metropolitan Water Board* v. *New River Co.* (7)

I ask the Court to adopt the view taken by the Court of the

(1) 7 Q. B. D. 505.
(2) 38 Ch. D. 56.
(3) [1904] 2 K. B. 174.
(4) (1875) L. R. 7 H. L. 653.
(5) [1902] A. C. 165.
(6) 11 Cl. & F. 590, 601.
(7) 20 Times L. R. 687, 689.

meaning of the word "private" in *Airdrie, Coatbridge and District Water Trustees* v. *Flanagan* (1) and to hold that the word does not add anything to the meaning of dwelling-house.

Cur. adv. vult.

April 1. The following written judgments were delivered:—

COZENS-HARDY M.R. This appeal depends upon the effect of certain local Acts which are so expressed as to be almost unintelligible. The plaintiffs' contention is that the guardians are entitled to have a supply for their workhouses of so much water as they require for domestic purposes at the rate prescribed by s. 68 of the Bristol Waterworks Act, 1862, in the case of supply to "private" dwelling-houses. It is necessary to consider the history of the case.

In 1846 the Bristol Waterworks Company was incorporated by an Act of that year. By s. 73 of that Act such inhabitants as desired to have water from the waterworks of the company had power to make connections with the mains or branch pipes of the company. But this right was qualified by s. 76, which enacted that no connection could be made by any owner or occupier of a dwelling-house who had not paid the portion of the yearly rent payable in respect of such dwelling-house thereby directed to be so paid in advance, and by s. 77 it was enacted that no person (except the owner or occupier of a "private" dwelling-house or part of a "private" dwelling-house) should make any service pipe to communicate with the pipes of the company except he should have agreed with the company for a supply of water to his buildings and premises. And by s. 86 the company was bound at the request of the owner or occupier to furnish to every occupier of a "private" dwelling-house or part of a "private" dwelling-house in any public street or road in which or within 100 yards of which any main pipe of the company should be laid a sufficient supply of water for the domestic use of every such occupier at rates there set out, which in fact vary with the annual rack rent or value of the premises so supplied. Sect. 91 authorized the company to supply any person

(1) 43 S. L. R. 422.

C. A. 1912

BRISTOL GUARDIANS v. BRISTOL WATER-WORKS COMPANY.

Cozens-Hardy M.R.

with water for other than domestic purposes upon such terms as should be agreed upon, but so that the amount required for domestic supply should not be prejudiced or diminished. The word "private" occurs only in s. 77 and s. 86.

Now on the construction of this Act it seems to me that the only person having the right to demand a supply was the owner or occupier of a "private" dwelling-house, but that the owner or occupier of a dwelling-house not private might notwithstanding s. 91 be supplied by the company with water for domestic purposes upon such terms as might be arranged by bargain. It was intra vires the company to make such a bargain.

In 1862 an Act was passed to repeal and consolidate the Acts relating to the Bristol Waterworks Company. By s. 2 of that Act the Act of 1846 was repealed subject to the provisions of this Act, but by s. 3, notwithstanding the repeal, the company was for the purpose of this Act as from the passing of the Act of 1846 to remain incorporated with all the incidents of an incorporated company. By s. 4 the Waterworks Clauses Act, 1847, except where otherwise specially provided, was incorporated with the Act. Sect. 68 is for all material purposes identical with s. 86 of the Act of 1846. In particular it contains the word "private" dwelling-house. But there is nothing corresponding to s. 77 of the Act of 1846. Sect. 73 is identical with s. 91. No other section need for the present purpose be referred to. There is no charging section except s. 68, and that only relates to "private" dwelling-houses.

It is now necessary to consider the effect of the incorporation of the Waterworks Clauses Act, 1847, regard being had to s. 1, which provides that all the clauses of the Act, save so far as they shall be expressly varied or excepted by any special Act, shall apply to the undertaking authorized so far as the same shall be applicable to the undertaking authorized thereby, and shall with the clauses of every other Act which shall be incorporated therewith form part of such Act, and be construed therewith as forming one Act. The Waterworks Clauses Act, 1847, contains provisions which Parliament usually insists upon before granting promoters powers which they seek. Sect. 35 requires the undertakers to provide a supply of pure water sufficient for the

domestic use of all the inhabitants who shall be entitled to demand a supply and shall be willing to pay water rate for the same, with a limitation that the undertakers are not bound to lay down pipes except at the request of so many owners or occupiers of houses in any part of the district as that the aggregate amount of water rate payable by them annually at the rates specified in the special Act shall be not less than one tenth part of the expense of providing and laying down such pipes. Sect. 48 empowers any owner or occupier of any dwelling-house who has paid or tendered the portion of water rate in respect of such premises by this or the special Act directed to be paid in advance to lay service pipes communicating with the company's mains, and by s. 53 every owner or occupier of any dwelling-house or part of a dwelling-house shall, when he has laid such communication pipes and paid or tendered the water rate payable in respect thereof, be entitled to demand and receive from the undertakers a sufficient supply of water for domestic purposes.

It is contended by the plaintiffs that, notwithstanding the word "private" in s. 68, the effect of the legislation is to bind the water company to supply every dwelling-house with water for domestic use, and that for this purpose the word "private" must be disregarded and treated as of no effect. An alternative contention is that there is an obligation to supply without any corresponding right of charging, so that the occupiers of dwelling-houses not private will get their water for domestic use gratis. Although there is a good deal of force in each branch of this contention, I agree with Eve J. that effect ought not to be given to it. It seems to me impossible to disregard the word "private." It obviously had a very distinct meaning under the Act of 1846, and I cannot assent to the view that the whole character of the obligations imposed upon the company was changed by the Act of 1862. Nor can I read the sections of the Waterworks Clauses Act, 1847, to which I have referred as conferring a statutory right upon all the inhabitants without reference to any corresponding obligation to pay. I agree that a local Act obtained by undertakers is a parliamentary bargain, and that the obligations plainly imposed upon the undertakers must be regarded as a totality, and that it is not necessary to find a

C. A. 1912

BRISTOL GUARDIANS v. BRISTOL WATER-WORKS COMPANY.

Cozens-Hardy M.R.

separate and distinct charge to meet each obligation, the benefits conferred upon the undertakers being also regarded as a totality. But in the absence of very clear words imposing an unconditional obligation I think the absence of any provision for payment is a legitimate argument against the existence of the obligation. I think it is not ultra vires of the company to agree to supply water for domestic uses to a person who cannot claim it as of right under s. 68. This is the view which has, we are told, been acted upon both before and since 1862.

Another consideration which weighs with me is this. If the word "private" is disregarded and treated as of no effect, the owner of every warehouse or factory which requires a small amount of water for sanitary purposes will be bound to pay the water rate calculated upon its annual value in addition to a special charge for any water used for trade purposes. This will throw an enormous burden upon the inhabitants of Bristol.

Some stress was laid upon the Bristol Waterworks Amendment Act, 1865, which incorporates the Waterworks Clauses Acts, 1847 and 1863. It authorized the construction of a store reservoir and provided under s. 26 that on completion thereof the company should be entitled to charge and receive, in addition to the water rents authorized by the Act of 1862, any sums not exceeding 1 per cent. on the annual rack rent or value of every dwelling-house or part of a dwelling-house supplied with water by the company. It seems to me that s. 26 only authorizes an additional rent in those cases where a rent was authorized by the Act of 1862. It does not enlarge the class of cases in which water rents are payable. It would have no application to a dwelling-house not within s. 58 which is supplied by a bargain made with the company. Sects. 30 and 32 seem to me to be open to the same remark.

Reference was also made to the Bristol Waterworks Act, 1902, s. 32. That section is so obscure that I am quite unable to draw any inference from it. Certainly I cannot hold that it is a parliamentary declaration that s. 68 applies to a dwelling-house whether private or not.

For these reasons I think that Eve J. was right in the view which he took as to the construction of the local Acts, and

that unless the plaintiffs are owners or occupiers of a private dwelling-house they can only claim to be supplied with water by way of bargain.

Upon the facts I think it is impossible to suggest that these workhouses, containing many hundred inmates, are "private" dwelling-houses. I am aware of the great difficulty of accurately defining what is a private dwelling-house, but I feel no difficulty in holding that the workhouses in respect of which the plaintiffs claim are far outside any possible definition of a private dwelling-house. For these reasons I think the appeal fails and must be dismissed with costs.

FLETCHER MOULTON L.J. In this case the guardians of the poor of the parish of Bristol sue the Bristol Waterworks Company for a declaration that they are entitled to be furnished by the defendants with a proper and sufficient supply of water for domestic purposes to the Stapleton Workhouse, St. Peter's Hospital, and other like buildings of which they are the owners and occupiers. The plaintiffs offer to pay therefor the water rents provided by s. 68 of the private Act of the company, the Bristol Waterworks Act, 1862, which is the section fixing the water rents chargeable by the company. The defendants in answer to this claim allege that the plaintiffs are only entitled to a supply of water for domestic purposes to the premises in question by agreement.

The facts of the case are as follows: The plaintiffs are owners and occupiers of certain workhouses, and homes for the reception of pauper children, and also of certain premises known as St. Peter's Hospital. Two of the workhouses accommodate a very large number of inmates, namely, 1268 and 1231 respectively. They also occupy a building which they use as a laundry for the purposes of the inhabitants of the other buildings. It is evident that for these purposes they require a supply of water both for domestic and non-domestic purposes. This they have for some time past received from the defendants, who are the water company for the supply of the district in which the plaintiffs' premises are situated. It has been supplied to them by meter at the rate of 1*s.* per 1000 gallons. This has been done by

C. A. 1912

BRISTOL GUARDIANS v. BRISTOL WATER-WORKS COMPANY.

Fletcher Moulton L.J.

agreement, but the plaintiffs in this action claim that they are entitled as of right to a supply for domestic purposes. They admit that the supply for non-domestic purposes must be by agreement, and they are willing to pay the price demanded for it, the two supplies being given separately so as to permit the measurement of the water used otherwise than for non-domestic purposes. The defendants deny the existence of any right of the plaintiffs to be supplied for domestic purposes. It is evident that the question is of great importance to the parties to this action. The point in issue is, however, of still wider application and raises a question of the gravest public interest involving the principles of construction to be applied to all private Acts relating to waterworks, and indeed in a greater or less degree to other public undertakings of the same type. I shall therefore examine the principles of construction to be applied to such Acts generally and then apply them to the facts of this particular case.

The promoters of waterworks undertakings for the supply of water to a town are compelled to come to Parliament for statutory powers to enable them to break up the streets and lay the pipes by which alone the supply can be given. The grant of these powers is, of course, a consideration of great value moving to them from the whole of the public of the district, and they obtain those powers in consideration of the advantages accruing to the whole of that public from the supply of water which is to be given. From the earliest times, therefore, Parliament in exercising its legislative powers in this way has recognized that it has a duty to protect the public by insisting on the insertion of clauses in the private Acts of such companies which will secure to the public generally the right to a proper supply. This is all the more important and indeed imperative by reason of the fact that the grant of such statutory powers vests in the water company a practical monopoly, because it would be intolerable to have competing water companies each with the right to break up the streets.

Prior to the year 1847 there was no standard form for those general clauses by which Parliament carried out its duty towards the public, whether they related to the powers granted to the company and the provisions as to the manner in which they were to

be exercised or whether they related to the rights to be given to the public in respect of supply. Each private Bill as drafted by its promoters had to be separately examined and the propriety and sufficiency of the clauses appearing therein separately determined. But it was felt that this not only gave great and unnecessary trouble to the Legislature, but it was also open to serious objections. A lack of vigilance on the part of the officials of the Legislature or the members of the committees might lead to wide variations in the rights given to and against the public in such Acts, whereas it was evidently just and desirable that there should be uniformity in such matters, excepting in so far as special local circumstances prevented it. Accordingly in the year 1847 the Waterworks Clauses Act, 1847, was passed, which is intituled "An Act for consolidating in one Act certain provisions usually contained in Acts authorizing the making of waterworks for supplying towns with water."

This Act standardized the general clauses of Waterworks Acts, and, although it was not statutably made applicable to all future Waterworks Acts applying to towns, the practice of Parliament has been to insist on its being incorporated in all Waterworks Acts since 1847 which establish new companies. With regard to companies of older date, the practice has been to require it to be incorporated in Acts relating to them when they have come to Parliament to obtain new powers of a substantial character. It was in this way that it was forced upon the whole of the London waterworks companies in 1847 or shortly afterwards, and it may now be said to form an integral part of substantially the whole of the waterworks legislation of our towns. By the first clause of the Act the whole of the clauses apply to every Act incorporating it "save so far as they shall be expressly varied or excepted by any such Act." No water company can therefore screen itself from the full effect of these general clauses except by express provision to that effect appearing in its private Act, and as all such express exemptions are certain to be closely scrutinized in the passage of the Bill through the Legislature the public is very effectively protected.

The Waterworks Clauses Act, 1847, does not, nor do any of

C. A. 1912

BRISTOL GUARDIANS v. BRISTOL WATER-WORKS COMPANY.

Fletcher Moulton L.J.

the later Acts of the same type, contain any clauses fixing the amount which the undertakers are to be entitled to charge for the supply given by them. That is a matter which must depend on local circumstances and is fitly relegated to the special Act. With regard to it the duties of Parliament are simply to see that the charges are not too heavy. They have no further duty to protect the promoters by taking care that the charges which they ask power to make are adequate. In this respect it is important to bear in mind the true nature of private legislation of this class. In depositing a Bill the promoters are making an offer to Parliament as representing the nation. They ask for powers which can only be given by statute largely because they infringe the rights possessed by the public or by members of it. They also ask for certain privileges such as the power to make and enforce charges. In return for all this they offer to undertake specified responsibilities and to perform specified duties. Parliament considers the offer, varies the terms as it thinks just, and in the Bill as it stands after passing through the two Houses it, in effect, makes a counter-offer, that is to say, it announces that it will accept on behalf of the public the terms therein contained and pass them into law. It is for the promoters to consider whether they will accept this counter-offer. It must never be forgotten that up to the moment of the Bill receiving the Royal assent the promoters have the power to abandon it. Until it becomes law they are the persons to decide whether they will accept the responsibilities in return for the privileges. Hence it is a recognized principle, affirmed more than once by the House of Lords, that such an Act (where the meaning is doubtful) must be construed in a way which is least favourable to the party obtaining it: *Stockton and Darlington Ry. Co.* v. *Barrett.* (1)

In the present case the Bristol Waterworks Company was incorporated by an Act of 1846. The Waterworks Clauses Act, 1847, could not, therefore, be incorporated in it, and its place is supplied by groups of special clauses more or less resembling the clauses of that Act in their purpose and effect. In the year 1853 the company applied for an amending Act which substantially

(1) 11 Cl. & F. 590.

was only for the purpose of authorizing them to raise further capital. In accordance with parliamentary practice this was allowed to pass without the incorporation of the Waterworks Clauses Act, 1847, being required. But in 1862 when they came to Parliament again for new powers a complete change was made. The two previous Acts were entirely repealed, and the whole of the constitution, rights, and privileges of the company were fixed by the new Act, which is intituled "The Bristol Waterworks Act, 1862." It incorporates the Waterworks Clauses Act, 1847, in the usual way "except where otherwise specially provided by the Act." There are two or three instances of such special provisions in the Act, such as the exemption from the duty of constant supply, to be found in s. 97, and the variation of clause 40 of the Waterworks Clauses Act, 1847, which is to be found in s. 101. But none of these affect any question in this action.

In considering the rights given to the public by the clauses of the Waterworks Clauses Act, 1847 (which must be taken to be incorporated in the Bristol Waterworks Act, 1862), it will be convenient to begin with s. 48. The material part of this section reads as follows: "Any owner or occupier of any dwelling-house, or part of a dwelling-house within the limits of the special Act who shall wish to have water from the waterworks of the undertakers brought into his premises, and who shall have paid or tendered to the undertakers the portion of water rate" directed to be paid in advance, may lay the necessary communication pipes for obtaining his supply. Sect. 53 then comes into effect. It reads as follows: "Every owner and occupier of any dwelling-house or part of a dwelling-house within the limits of the special Act shall, when he has laid such communication pipes as aforesaid, and paid or tendered the water rate payable in respect thereof, according to the provisions of this and the special Act, be entitled to demand and receive from the undertakers a sufficient supply of water for his domestic purposes."

The above sections are sufficient to raise the point in dispute in this case, although others might be referred to which also raise it. To my mind their conjoint effect is to secure to every "owner and occupier of any dwelling-house, or part of a

C. A. 1912

BRISTOL GUARDIANS v. BRISTOL WATER-WORKS COMPANY.

Fletcher Moulton L.J.

dwelling-house within the limits of the special Act" a right to "demand and receive from the undertakers a sufficient supply of water for his domestic purposes" if he is willing to do all that he is required to do by the general or special Act. In this case it is admitted that the plaintiffs are owners and occupiers of a dwelling-house within the limits of the special Act. They are willing to do everything required of them by the general or special Act. But the defendants say "We only reserved the right to charge a water rent in respect of 'a private dwelling-house' and therefore we have no right to charge you a water rent because your house is not a 'private' dwelling-house. This takes away your right to a supply for domestic purposes."

I entirely fail to follow this argument. The right is given to the owner or occupier of every dwelling-house within the limits of the special Act. He has only to pay or tender such water rent as is reserved, and if none is reserved he has to pay or tender none. If there is a defect in the charging schedule so that no water rent has been reserved in his case, that is the fault of the company, and it cannot lessen the obligations which they have taken towards the public. They cannot restrict the area of the obligation which extends to all dwelling-houses by reserving a right to charge only in cases of private dwelling-houses. If they have made a blunder in their private Act and omitted to take the right to charge in certain cases they must go back to Parliament to obtain an amendment of the Act, and if they can make out a proper case for it, Parliament will doubtless allow them to correct it. But as things stand they cannot refuse a supply for domestic purposes to any owner or occupier of a dwelling-house within the limits of their Act who is ready to do everything which their Act entitles them to require of him.

That this is the correct interpretation appears still more clearly if we analyse the structure of these clauses. Their object is clearly to secure for the public a proper supply of water. This requires that they should define exactly, first, the class of persons entitled to demand a supply, next, the nature of the supply which they are entitled so to demand, and, finally, the terms on which they are entitled to demand it. The first of these is

defined in the clearest and most absolute terms. The right is given to "every owner and occupier of any dwelling-house or part of a dwelling-house within the limits of the special Act." The nature of the supply which a member of this class is entitled to demand is also defined in terms which are equally clear and absolute, "a sufficient supply of water for his domestic purposes." In neither of these delimitations is there any reference to the special Act. The reason why they are independent of local or special considerations is not far to seek. They rest on grounds of general public policy. The Legislature is thereby securing to the public the right to obtain such a supply of water as is requisite for health, cleanliness, and sanitation, and to effect this it cannot permit the class or the nature of the supply to be more restricted. So consistently has the Legislature followed these lines that I have never in my experience of Waterworks Acts in which the Waterworks Clauses Act, 1847, has been incorporated known of any case where any modification of the Act has been permitted upon these points.

But in justice to the undertakers the Legislature is bound to secure that they receive in respect of this compulsory supply the return to which they are entitled. Here the special Act comes in. It is decisive on this point because the Waterworks Clauses Act, 1847, does not fix the remuneration which is to come to the undertakers, but leaves it to be fixed entirely by the special Act. Hence to obtain this statutory supply the person must have "paid or tendered the water rate payable in respect thereof according to the provisions of the special Act." To ascertain what that rate is one must turn to the charging section of the special Act, because the undertakers are not entitled to charge any rate which is not authorized by the special Act. If no rate appears there applicable to a particular case the water rate in that case is nil. But this does not affect the obligations to supply, which are general, but only the terms. No power of charging in that case has been asked for or granted by the Legislature, and no such power forms part of the consideration of the parliamentary bargain which the undertakers have entered into.

There are, as I have said, other similar clauses in the Waterworks Clauses Act, 1847, which raise the same point.

C. A. 1912

BRISTOL GUARDIANS v. BRISTOL WATER-WORKS COMPANY.

Fletcher Moulton L.J.

They are all framed in the same way. The privilege and the class that is entitled to it are defined in clear words obviously chosen to include the whole public in the district and to secure to them the power of procuring an adequate supply. These words make no reference to the special Act. That is referred to only in relation to the terms on which the privileges are to be enjoyed, and the provision as to the terms is in substance that the public must duly pay what the special Act provides. In such a case it would be contrary to the fundamental principles of construction to hold that the absence of a power of charging limited the class of those entitled. Suppose a statutory company obtained the power to build a bridge and its Act provided that it should be open at all times to all His Majesty's subjects to pass over on payment of the tolls by the Act provided. The company could not refuse to allow a person to cross the bridge at night because they had only reserved the right to charge tolls between 6 A.M. and 8 P.M. Or take the case of a railway company which can only make such charges as it is empowered to make by its special Act. If it was provided that a consignee should have the right to delivery on payment of charges for freight and terminals no one could say that the clause did not apply to cases where no terminals were payable. In such provisions "charges" or "rates" means charges or rates "if any."

In the present case the charging section is so wholly at variance with the scheme of the incorporated clauses that to hold that it limited them would practically amount to striking them out. For example, the incorporated clauses entitle every owner or occupier of a dwelling-house within the district to make connection with the pipes of the company and obtain a supply for domestic purposes, whereas s. 68 of the Act of 1862, which is the charging section, only refers to private dwelling-houses in a public street or road within 100 yards of a main. It is clear, therefore, to my mind that there are persons entitled to a supply for domestic purposes whom the company is not empowered to charge.

It was contended that this interpretation is unreasonable. I cannot see what the question of reasonableness has to do with it. The Act was not forced on the promoters in invitos. It was for

them to consider whether they would accept the Bill—in other words whether they would accept the totality of the obligations in return for the totality of the privileges. There is nothing in these Acts to suggest that any particular portion of the obligations is to find its adequate equivalent in any particular portion of the privileges. For instance, a waterworks company might be willing to give a domestic supply at a very low figure in consideration of a power of charging by agreement for the water which they might expect to supply for trade purposes or vice versa. Assuming that the meaning of this Act is that there is no power of charging public institutions for their domestic supply, there is nothing to shew that the undertakers are not abundantly remunerated by the rates which they are by s. 68 entitled to charge in the immeasurably more numerous cases of private dwelling-houses and by the power to supply water for other than domestic purposes at their own prices which is given them by s. 73. The argument that the interpretation must be rejected because it imposes an unreasonable burden on the undertakers has therefore no basis either in fact or law. There is no evidence to shew that the totality of the burden is unreasonable when compared with the totality of the charging powers. And even if this could be shewn it would be entirely due to the act of the promoters in accepting the Bill voluntarily. Having thus accepted it they must abide by its terms until they get them varied by Parliament.

But when I turn to the other side of the question and consider whether the interpretation contended for by the defendants is reasonable towards the public the answer is very different. The defendants contend that where they have not reserved a water rent there is no obligation to supply for domestic purposes. This means that a portion of the public (from the whole of whom the consideration of the special privileges of breaking up streets, &c., moved) is shut off from the privileges of the Act because the promoters have omitted to make their charging section complete, and this is to be so notwithstanding that the Waterworks Clauses Act, 1847, expressly gives the right to every owner or occupier of a dwelling-house within the limits of the special Act. Let me examine the consequences of this in the present case. The

C. A. 1912

BRISTOL GUARDIANS v. BRISTOL WATER-WORKS COMPANY.

Fletcher Moulton L.J.

power to sell water under s. 73 is only to sell water "for other than domestic purposes," and as it is well settled law that a statutory company such as the defendants can only do that which it is empowered to do by its parliamentary powers, the defendants have no power to sell water to the plaintiffs for domestic purposes. In other words we are asked to interpret the Act in a way which would leave all dwelling-houses other than "private dwelling-houses" without any means of obtaining either by agreement or otherwise a supply for domestic purposes. Remembering that Acts like these are to be construed in the most favourable way to the public I think no more unreasonable contention could be formulated than that we should put the suggested interpretation on this Act.

I have pointed out that in this case the powers of sale of water given by s. 73 are restricted to water for other than domestic purposes, and that therefore it would be ultra vires to sell water to the plaintiffs for domestic purposes. But if s. 73 gave to the defendants a power to sell water for all purposes the suggested interpretation would still be, to my mind, contrary to the principles which have guided Parliament in these matters as is shewn by the structure and enforced incorporation of the Waterworks Clauses Act, 1847. Proper sanitary arrangements in a dwelling-house are a civic duty and they cannot be carried out without a proper supply of water for domestic purposes. If the omission of a class of dwelling-houses from the charging section leaves the owners or occupiers without a right of supply for domestic purposes it puts them absolutely at the mercy of the undertakers.

On the one hand, the owners or occupiers must get the water or be guilty of breaches of the sanitary laws, and on the other hand, the undertakers can please themselves as to whether and on what terms they will give them the necessary supply. Considering the nature of the privileges given to the water companies by these Acts, and the fact that they amount practically to monopolies, I cannot entertain the slightest doubt that the obligation to supply the owner or occupier of every dwelling-house within the limits of the special Act was intended to be (as I hold that under the language of the Waterworks Clauses Act, 1847, it in law is)

absolute, provided he is willing to do all that the undertakers are entitled to demand from him under their Act. The clauses no doubt contemplate that the undertakers will have taken care to obtain the power to charge a water rate in respect of each supply, and of course the special Act requires that such water rate should be paid or tendered. But their not having done so is no excuse. All that has to be paid or tendered is the water rate, if any, that they are empowered to charge.

I see no reason why I should not point out the way in which, in my opinion, this trouble has come about in the present case. The charging section is taken almost verbatim from a section in the original Act of 1846 where the obligation of supply was far more limited than under the Waterworks Clauses Act, 1847. That Act contained a section which specially provided that no inhabitant of a dwelling-house other than a private dwelling-house should make communication with the pipes of the company by which the supply was to be given until he had agreed with the company for a supply of water to his premises. For the purposes of such an Act a charging section in the words of s. 68 would be adequate. The draftsman of the Act of 1862 evidently did not realize the difference between the obligations under that Act and those which the company undertook when the Waterworks Clauses Act, 1847, was incorporated in their Act of 1862 and the earlier Acts were wholly repealed. He therefore left the charging section unaltered. We may regret the mistake, but it would be pessimi exempli, in my opinion, to destroy the protection given to the general public by the provisions of the clauses of the Waterworks Clauses Act, 1847, in order to save the defendants from the effect of what is obviously a draftsman's blunder.

I am, therefore, of opinion that if the houses of which the plaintiffs are the owners or occupiers do not come under the denomination of "private dwelling-houses" the consequence would be that under the defendants' Act of 1862 the defendants would be under an obligation to give to them a sufficient supply of water for domestic purposes, but they would have no power to charge for such supply. The plaintiffs, however, are willing to accept the alternative, that these houses come under the designation of private dwelling-houses, and are ready to pay the water

C. A. 1912

BRISTOL GUARDIANS v. BRISTOL WATER-WORKS COMPANY.

Fletcher Moulton L.J.

rent authorized by s. 68 (as modified by a subsequent Act) in the way prescribed by the Act. The defendants have refused to give such supply, and it is they who raise the contention that the rates authorized by s. 68 do not apply to these premises. As I am of opinion that the obligation of the defendants to supply is exactly the same whether the premises are, or are not, private dwelling-houses, I think it unnecessary for the purposes of this action to examine into the question of the meaning of that phrase. It occurs nowhere else than in s. 68 of the Act of 1862. In all other sections of that Act and the other Acts relating to the company (including the incorporated sections) the phrase used is "dwelling-house" or "house." I do not, however, feel that the Court can reject the word, though that is what is needed to correct the blunder that has been made. The Legislature alone can alter its own Acts.

I have said that in my opinion the only course for the defendants to take to correct the blunder in their Act is to obtain an amending Act. It was contended before us, on behalf of the plaintiffs, that this had in fact been done. Counsel referred us to s. 26 of the Bristol Waterworks Amendment Act, 1865. That was an Act to enable the company (among other things) to construct certain works for the purposes of bringing the water of the Midgel and Chelvey springs into their reservoir. By s. 26 it was provided that, after the water of these springs had been brought to their reservoir, the company "shall be entitled to charge and receive, in addition to the water rents authorised by the Act of 1862, any sums not exceeding one per centum per annum on the annual rack-rent or value of every dwelling-house or part of a dwelling-house supplied with water by the company within the limits of the Act of 1862." The Waterworks Clauses Act, 1847, is incorporated with this Act without any qualification whatever. The question is whether this justifies us in rejecting the word "private" in s. 68 of the Act of 1862 and treating it as a recognition by the Legislature that the rate in the Act of 1862 applies to all dwelling-houses supplied with water by the company within the limits of the Act.

I should be glad if I could come to such a conclusion, as it would, in my opinion, relieve the defendants from the effects of

the blunder which I have pointed out, while leaving unaffected the rights of the plaintiffs in the form in which they are asserted in this action. But I cannot construe the section as doing more than creating an additional water rate which is applicable to all dwelling-houses supplied by the company whether they be private dwelling-houses or not. But I think it gets rid of the possibility of contending that at the present time dwelling-houses which are not private dwelling-houses have no water rent reserved in respect of them. This new 1 per cent. applies to such houses and it is a water rate, so that if (as the defendants argue) the obligation to supply under the clauses of the Waterworks Clauses Act, 1847, depends on some water rate being chargeable in respect of the house, there is under the Act of 1865 a water rate of 1 per cent. chargeable. Take the case of a dwelling-house not being a private dwelling-house erected after 1865. It is even on the defendants' contention entitled to a supply on the tendering of the water rate which is chargeable in respect of it under the private Acts of the company. Now the rate of 1 per cent. on the rack rent or value is undoubtedly chargeable in respect of it. And unless the defendants get their Act of 1862 amended, this liability to pay 1 per cent. on the rack rent or value of dwelling-houses that are not private dwelling-houses represents all the charging powers of the defendants in respect of those houses.

We were also referred to ss. 31 and 32 of the Bristol Waterworks Act, 1902. This Act also incorporates the Waterworks Clauses Act, 1847. The effect of s. 31 is to modify s. 69 of the Bristol Waterworks Act, 1862. By that section the company were empowered to charge an extra $1\frac{1}{2}$ per cent. upon the annual rack rent or value of dwelling-houses situated in a particular area of their district. That power is taken away by the section under consideration. I do not think it bears upon any question in this action, excepting that the phrase used throughout is "dwelling-house" and not "private dwelling-house." Sect. 32 also has no direct bearing on these questions, excepting that it shews that a house that is partly used as a dwelling-house and partly for trade purposes is regarded as a house for which the water rate payable is calculated wholly or partially as a percentage on the

C. A. 1912

BRISTOL GUARDIANS v. BRISTOL WATER-WORKS COMPANY.

Fletcher Moulton L.J.

rack rent or value. This is a further indication how completely the restriction to private dwelling-houses in the original charging section is out of keeping with the rest of the legislation relating to the company, but it does no more.

On the whole case, therefore, I am of opinion that the plaintiffs are entitled to a supply for domestic purposes, because they are the owners or occupiers of dwelling-houses situated within the limits of the defendants' Acts, and they have done or offered to do everything necessary to entitle them to that supply, inasmuch as they have offered to pay a water rent in respect of those premises which is equal to that which the company is empowered to charge for private dwelling-houses by the Act of 1862 plus the 1 per cent. additional which they are entitled to charge for all dwelling-houses, so that the sum which they have offered is sufficient whether those houses (which are admitted to be dwelling-houses) are held to be private dwelling-houses or not. The defendants have wrongfully refused to give the supply, and I hold, therefore, that the plaintiffs are entitled to the declaration they ask for, and to have judgment in the action with costs here and below.

BUCKLEY L.J. Sect. 68 of the Bristol Waterworks Act, 1862, qualifies the word "dwelling-house" by the word "private." The question for decision is, first, whether in that enactment some meaning must not be attributed to that word "private," and, if so, whether it is the ordinary meaning of the word, and secondly, whether, if that be so, a workhouse such as that here in question is a private dwelling-house.

An earlier Act relating to this undertaking, namely, the Bristol Waterworks Act, 1846, contains in ss. 77 and 86 the expression "private dwelling-house," which is found surviving in s. 68 of the special Act of 1862. The Act of 1862 recited that it was expedient that the provisions of the recited Acts, which included the Act of 1846, should be consolidated and amended, and by s. 2 repealed the Act of 1846 subject to the provisions of the Act of 1862. The only light which these considerations throw upon the question is that the expression "private dwelling-house" used in an Act of a date earlier than the general Act of 1847 is

reproduced in a special Act of 1862 passed after 1847, and that the purpose of the Act of 1862 was to consolidate and amend the Act of 1846. I am unable to find that elsewhere in any of the special Bristol Waterworks Acts, or in the general Act, does the word "private" qualifying the word "dwelling-house" occur. It is under these circumstances that the meaning of "private dwelling-house" in this Act of 1862 is to be sought.

It will be convenient first to consider the provisions of the general Act of 1847. That is an Act which, as provided by s. 1, is such as that when incorporated into a special Act all the clauses of the general Act, save so far as they shall be expressly varied or excepted by the special Act, shall apply. That Act is by s. 4 of the special Act of 1862 incorporated, except where otherwise specially provided by the special Act of 1862. The Act of 1847, by s. 35, obliges the undertakers to supply water sufficient for the domestic use of all the inhabitants who as thereinafter provided shall be entitled to demand a supply and shall be willing to pay water rate for the same. The observation upon this section is that the obligation is not to supply all the inhabitants, but some of the inhabitants, namely, those entitled to demand a supply and willing to pay water rate.

In order to obtain a supply the consumer must connect his premises with the mains of the undertakers, and power so to do is given by s. 48. It is not a section which enables every owner or occupier to make a connection. For one thing, he cannot open the ground without first obtaining the consent of the owners or occupiers of the ground. That is a difficulty which may cut him off from obtaining a supply. Secondly, he must have paid or tendered to the undertakers the portion of water rate by the general Act or the special Act directed to be paid in advance. This seems to contemplate the case of a person who is chargeable with water rate to the exclusion of the person who is not. When he has laid his communication pipes the owner or occupier is by s. 53 entitled to demand a supply, but only when he has paid or tendered the water rate payable according to the provisions of the general Act and the special Act. The observation here is similar to that upon s. 48. There is no water rate imposed by the general Act in the sense of naming the amount of

C. A. 1912

BRISTOL GUARDIANS v. BRISTOL WATER-WORKS COMPANY.

Buckley L.J.

the rate. There is only a section with reference to payment and recovery of the water rate, namely, s. 68. That provides that the water rate except as in the general Act and special Act mentioned shall be payable according to the annual value of the tenement supplied. The section as to payment in advance is s. 70. From these sections of the general Act I conclude that it does not provide for the supply of water to every inhabitant, but only to certain inhabitants. There is no restriction to private dwelling-houses; the word of the Act is always "dwelling-house." But not every owner or occupier of a dwelling-house has the right to demand a supply. The Act in brief may be said to oblige the undertakers to furnish a supply to the owner or occupier of every dwelling-house whether public or private if, being in a position to do so, he has laid a communication pipe and has paid or tendered the water rate payable according to the provisions of that general Act and of the special Act.

I pass to the special Act of 1862. It contemplates supplying with water the inhabitants of the district, an expression found in the preamble and in s. 66 of the Act. It incorporates the general Act of 1847 in the way I have stated, and then by s. 68 obliges the company to supply the persons there named. For qualification under that section the house must be a private dwelling-house, whatever that expression means, and must be in a public street or road such as there described. Apart, therefore, from the question upon the words "private dwelling-house" the section does not extend to some dwelling-houses, namely, houses in private roads. There is certainly not here any indication of an obligation to supply all dwelling-houses.

I cannot find that the word "private" occurs again in the Act, but the same result is attained by predicating of the dwelling-house when subsequently mentioned that it is a house in respect of which water rent is payable. Water rent is only payable (so far as express language is concerned) under s. 68, that is, in the case of the private dwelling-house. As to predication of the dwelling-house that it is one on which water rent is payable, I refer to s. 69, which authorizes an increased rate for certain houses and says that if the dwelling-house be situate in a particular place the company may add to the water

rate payable in respect of the said house. The dwelling-house in that section would therefore seem to be a house which under s. 68 is to pay a water rate. Anticipating the subsequent special Acts, the same observation is true of s. 26 of the special Act of 1865 and of s. 31 of the special Act of 1902.

So far therefore it seems to me that the Act of 1862 has imposed the obligation only in the cases mentioned in s. 68, and that is confined to private dwelling-houses. It is necessary, however, to pause and compare s. 68 of 1862 with s. 53 of 1847. The latter extends to any dwelling-house, that is, whether public or private. The former extends to private dwelling-houses only. As regards public dwelling-houses, therefore, the provisions of the general Act are not expressly varied or excepted, nor is there anything otherwise specially provided in the Act of 1862. Further, s. 53 of 1847 is a general clause of obligation whereas s. 68 of 1862 is a clause of obligation at a price. But these considerations do not seem to me to advance the matter, because s. 53 of 1847 is confined in its operation to the owner and occupier of a dwelling-house (let me instance a public dwelling-house) who has paid or tendered the water rate payable in respect thereof according to the provisions of the general Act and the special Act. But there is in those provisions no water rate payable in respect of the public dwelling-house. For the only provisions are provisions relating to a private dwelling-house. Sect. 53 of 1847 therefore for the purposes of the Act of 1862 contains nothing additional to s. 68 of the Act of 1862.

Sect. 71 of the Act of 1862 is largely unintelligible. The words "or for railway purposes" may I think be relied on in argument for the purpose of shewing that the house described in s. 68 as a private dwelling-house may be one capable of using water for railway purposes. I cannot give any intelligible meaning to these words, unless it be that the buildings of a railway station (which would I think within the authorities be for this purpose a dwelling-house) may contain urinals and washing basins, and in that way the words may be intelligible, and this would give ground for an argument that (say) a railway station was within the meaning of the Act of 1862 a private dwelling-house. But the section is one so full of difficulty that I cannot found myself upon it.

C. A. 1912

BRISTOL GUARDIANS v. BRISTOL WATER-WORKS COMPANY.

Buckley L.J.

Sect. 73 of the Act of 1862 creates great difficulty. If s. 68 is read as if the word "private" were not there so as to make it applicable to every dwelling-house, s. 73 is easy. But if the word "private" be given its proper and ordinary meaning, it results that the owner or occupier of a public dwelling-house has no right of supply for, and that s. 73 does not empower the company to give him a supply for, domestic purposes. This is a strong argument for striking "private" out of s. 68 altogether. On the other hand, if an obligation to supply to everybody for domestic purposes is to be inferred from the general tenor of the Act (although I cannot find it), there is no charging section and the company must supply gratuitously. A further consideration is that as regards supply for non-domestic purposes it may well be that the Legislature left it to the haggle of the market to determine what payment shall be made, but that it is improbable that for domestic purposes for which water is necessary for sanitary reasons it should leave the undertakers at liberty to extort what might be an exorbitant price.

As between the difficulty of being driven to strike "private" out of s. 68 or of giving it its full effect in s. 68 and facing the inevitable consequences, it seems to me that the answer may be the following. The company as sellers of water may do all that is properly incidental to their objects as disclosed by the Act of incorporation, and although s. 73 names certain sales which it shall be lawful for them to make, it does not follow that a sale for domestic purposes to a public dwelling-house is ultra vires. It would, I think, be impossible to contend that that would be the case. A possible and further ingenious construction of s. 73 is this, that domestic purposes in s. 73 means domestic purposes in a private dwelling-house under s. 68, and that s. 73 means that the company may supply any person (including therefore one in a public dwelling-house) with water for other than "domestic - purposes - in - a - private - dwelling - house," inserting hyphens so as to make that expression one long compound word. From this it would result that the company may supply any person in a public dwelling-house with water for domestic purposes in a public dwelling-house because that is not within the words of exception. There is one further observation upon

s. 73, and it is this. The concluding words emphatically shew that domestic purposes are to be ensured a sufficient supply and there is nothing to confine the words to domestic purposes in a private dwelling-house. Reliance may properly be placed upon these words to shew that supply for domestic purposes wherever required is not ultra vires the undertakers. In the argument on the subsequent special Act reliance was placed upon ss. 26 and 32 of the Act of 1865 and ss. 31 and 32 of the Act of 1902, but I cannot see that they advance the matter. The houses contemplated by those sections are houses upon which water rents are payable, and if those are confined to private dwelling-houses by s. 68 of the Act of 1862 the matter remains unaltered.

It has been decided that in Acts such as these the word "dwelling-house" is not confined to houses used for purposes of residence, but extends to buildings used for purposes of trade occupied not necessarily at night but during the daytime and in which water for domestic purposes for washing or for flushing closets is necessary. In the case of such a factory—if "private" be struck out of the Act—the undertakers will be entitled to payment for water for domestic purposes at the rate calculated upon the rack-rental or rateable value, and for water supplied for trade purposes will be entitled in addition to a proper charge for supply by meter. The result is that a large factory of very large rateable value using a comparatively small amount of water for domestic purposes may have to pay a very large sum out of all proportion to the service received. To strike the word "private" out of s. 68 is to expose the owners and occupiers of all buildings of this description to a very large burden, and Mr. Upjohn, for the water company, under these circumstances, thought it right to point out that that was so although a decision to strike out the word "private" not in the particular case of this workhouse but in all cases taken in the aggregate was largely to the company's benefit. Upon this ground, I should hesitate long before saying that the word "private" is to be disregarded. But upon broader grounds it seems to me that proper effect must be given to the word. It is found in the section. It bears a perfectly intelligible meaning, and as matter of construction I have no right to say that it is to be disregarded unless I can, from other

C. A. 1912

BRISTOL GUARDIANS v. BRISTOL WATER-WORKS COMPANY.

Buckley L.J.

parts of the Act, find that I am driven so to do. I do not think that I am thus driven, and I think that the scale of charges in s. 68 is, therefore, confined to private dwelling-houses whatever that expression is to mean.

It remains to determine whether this workhouse is a private dwelling-house. It has been decided that any house in which water is required for domestic purposes is a dwelling-house within the meaning of s. 35 of the Act of 1847: *Cooke* v. *New River Co.* (1) Workhouse schools are a dwelling-house: *South-West Suburban Water Co.* v. *St. Marylebone Union* (2); and a workhouse is a dwelling-house: *Liskeard Union* v. *Liskeard Waterworks Co.* (3); *Chester Waterworks Co.* v. *Chester Union.* (4)

This workhouse would therefore be entitled to be supplied for domestic purposes under s. 68 if the word of s. 68 was "dwelling-house." But it is not. The words are "private dwelling-house." I have endeavoured to suggest instances of non-private dwelling-houses or public dwelling-houses whatever the expression ought to be. The buildings of a railway station to which the public have certain rights of public access for the purpose of using the railways, which are bound by statute to carry them on certain terms, may I think be an instance. But I cannot think of a better instance than a workhouse. It is a public institution maintained at the public expense to which every member of the public under circumstances is entitled to access, at which the inmates are bound by restrictions as to coming and going and as to their conduct there, and if I am to choose between calling a workhouse a private dwelling-house and calling it one which is public or which is not private, I can find no alternative but to say that it is not a private dwelling-house.

In my judgment there is to be attached to the word "private" in s. 68 of the Act of 1862 a meaning, and the meaning is the ordinary meaning of the word, and the workhouse is not within that ordinary meaning.

For these reasons, I am of opinion that the plaintiffs cannot claim the relief which is sought in this action and that the action fails and was rightly dismissed with costs.

(1) 38 Ch. D. 56.
(2) [1904] 2 K. B. 174.
(3) 7 Q. B. D. 505.
(4) 98 L. T. 701.

COZENS-HARDY M.R. The appeal will be dismissed with costs.

Solicitors: *Meredith, Mills & Clark, for Osborn, Ward, Vassall & Co., Bristol; Woodcock Ryland & Parker, for Edward Gerrish, Harris & Co., Bristol.*

W. I. C.

END OF VOL. I.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1912, will be as follows:—

In the First Series,
[1912] 1 Ch. [1912] 2 Ch.

In the Second Series,
[1912] 1 K. B. [1912] 2 K. B. [1912] 3 K. B. [1912] P.

In the Third Series,
[1912] A. C.

INDEX.

ABANDONMENT—Trespass by tipping against wall — Adjoining owners of land — Boundary — Erection of wall within boundary line—Discontinuance of possession – – – – – **527**
See TRESPASS.

ACKNOWLEDGMENT — Statute-barred debt — Executors — Affidavit for probate — Limitation– – – – – **196**
See ADMINISTRATION. 1.

ADEMPTION — Legacy — Subsequent gift of equal amount – – – – **591**
See WILL. 8.

—— Will—Legacy—Specific bequest of shares — Reconstruction of company — Whether specific bequest adeemed **828**
See WILL. 7.

—— Will—Specific legacy—Definite number of the shares belonging to testator in company A—Sub-division of shares – **29**
See WILL. 13.

ADMINISTRATION—*Creditors—Testator of Unsound Mind—Bank Advances for Maintenance of Lunatic's Household—Bank Charges for Overdraft — Necessaries — Repairs — Rent Audits—Statute-barred Debt—Executors—Acknowledgment—Affidavit for Probate—Limitation Act*, 1623 (21 *Jac.* 1, *c.* 16), *s.* 3.

A customer of a bank became of unsound mind. His son arranged with the bank to continue the lunatic's banking account and to draw upon it on behalf of the lunatic for the maintenance of the lunatic's household and for the necessary outgoings of his estate. At the death of the lunatic this banking account was overdrawn. In a creditor's action to administer the real and personal estate of the lunatic the bank claimed to prove as creditors for the amount of the overdraft, which included usual bank charges for interest and commission:—

Held, that although the bank were not creditors of the lunatic they were entitled under the doctrine of subrogation to stand in the shoes of creditors paid by the son by means of the banking account for necessaries supplied for the maintenance of the lunatic's household, and for the necessary outgoings of his estate.

But *held*, that the bank were not entitled to prove for interest and commission on the overdraft.

In a proper case necessaries may include interest on mortgages, repairs, insurance, and rent audit expenses.

An executor's affidavit for probate which includes, in the list of the testator's debts, a statute-barred debt of the testator does not operate as an acknowledgment so as to take the debt out of the Statute of Limitations.

Stamford, Spalding and Boston Banking Co. v. *Smith* [1892] 1 Q. B. 765, followed.

Smith v. *Poole* (1841) 12 Sim. 17, is no longer law.

In re Emmett (1906) 95 L. T. 755, questioned. *In re* BEAVAN. DAVIES, BANKS & Co. *v.* BEAVAN – – – – **Neville J. 196**

2. —— *Following Assets—Secured Creditor—Equitable Right—Delay not amounting to Laches.*

Mere delay does not deprive a creditor of his equitable right to follow his deceased debtor's assets for payment of an existing debt.

The mortgagor of a freehold house died shortly after assigning the equity of redemption. Six months later the mortgagee was informed of the assignment and death, but as he received his interest regularly from the assignee he took no steps to realize his security or to enforce the mortgagor's covenant. After thirteen years the assignee made default, and the security was found insufficient. The mortgagor's estate had long since been distributed:—

Held, that the mortgagee was entitled to follow the mortgagor's assets for any deficiency on the security.

Principles stated in *Blake* v. *Gale* (1886) 32 Ch. D. 571, *Ridgway* v. *Newstead* (1861) 3 D. F.

ADMINISTRATION—*continued.*

& J. 474, and *Leahy* v. *De Moleyns* [1896] 1 I. R. 206, followed and applied.

Decisions in *Blake* v. *Gale* and *Ridgway* v. *Newstead* distinguished on the special circumstances. *In re* EUSTACE. LEE *v.* MCMILLAN **Swinfen Eady J. 561**

—— Annuity.
See under ANNUITY.

—— Executor.
See under EXECUTOR.

ADVANCES— Debt — Release — Cancellation — Will—Construction—Deduction of debts from settled legacies — Advances by testator – – – – – – **498**
See DEBT.

AFTER-ACQUIRED PROPERTY—Covenant to settle — Hotchpot clause — Trusts by reference – – – – – **795**
See SETTLEMENT.

AGRICULTURAL HOLDINGS — Compensation for improvements—Landlord's written consent—Liability – – – **479**
See VENDOR AND PURCHASER. 1.

ALLOTMENT — Statutory meeting — Notice — Shares—Allotment as fully paid – **700**
See COMPANY. 6.

AMALGAMATION—Railway.
See under RAILWAY.

AMBIGUITY — Will — Construction — Name — Misdescription — Gift to non-existing person—Latent ambiguity – – **435**
See WILL. 9.

ANCIENT LIGHTS.
See under LIGHT.

ANNUITY — *Arrears—Interest—Administration Action—Judgment Debt—Practice—Rules of the Supreme Court*, 1883, *Order* LV., *rr.* 62, 63.

By a settlement made in 1897 on the marriage of his brother, the testator covenanted to pay to the trustees thereof an annuity of 400*l.* during the joint lives of the brother and his wife. The annuity was paid down to the quarter preceding the testator's death, which took place in October, 1902. After his death an administration action was commenced by the residuary legatees under his will, and accounts and various inquiries were directed. By a certificate of the Master dated April 30, 1908, the arrears of the annuity were found to be 2158*l.* 6*s.* 6*d.*, and the whole arrears were not finally paid until August 24, 1910 :—

Held, that interest was payable at 4 per cent. upon the arrears of the annuity from the date of the judgment, in accordance with the provisions of Order LV., rr. 62, 63, and on such parts as accrued due subsequently to the judgment, from the dates when they respectively accrued due down to actual date of payment in all cases.

The rule of practice stated in *Earl of Mansfield* v. *Ogle* (1859) 4 De G. & J. 38, that, as a general rule, no interest will be allowed on arrears of an annuity, is applicable in the case of a foreclosure or redemption action as between

ANNUITY—*continued.*

incumbrancers, and as against the property charged, but has no application to the working out of a judgment in an action for the administration of the estate of the grantor of an annuity.

Lainson v. *Lainson* (No. 2) (1853) 18 Beav. 7, followed. *In re* SALVIN. WORSELEY *v.* MARSHALL – – – – – **Eve J. 332**

APPOINTMENT—Trustee.
See under TRUSTEE.

ARBITRATION—*Lease — Construction — Claim for Rectification—Question of Law—Arbitration Clause — Legal Proceedings — Application for Stay—Arbitration Act*, 1889 (*52 & 53 Vict. c.* 49), *s.* 4.

By a deed, dated in 1901, the plaintiff company leased its undertaking, business, and goodwill to the M. company for a term of twenty-one years, subject to certain powers of determination and renewal therein mentioned. The deed contained a proviso giving an option to the M. company and the L. company, or either of them, of purchasing the undertaking of the plaintiff company. The deed also contained an arbitration clause which provided that "any dispute, difference or question which may at any time arise between all or any of the parties hereto touching the construction, meaning or effect of these presents, or any clause or thing herein contained, or the rights or liabilities of the said parties respectively, or any of them under these presents or otherwise howsoever in relation to these presents shall be referred" to arbitration. In 1903 the M. company and the L. company agreed to amalgamate, and for that purpose they were respectively wound up, and a new company, the defendant company, was formed to take over their undertakings and assets. By a deed dated in 1905 and made supplemental to the deed of 1901, the defendant company was substituted for the M. and L. companies in the latter deed, and undertook the obligations and became entitled to the benefits of those companies under that deed. Questions having arisen with reference to the option to purchase given by the deed of 1901, the plaintiff company brought an action claiming by its writ (inter alia) (1.) a declaration that the option was void and of no effect; (2.) in the alternative, that is, if the option was not void, a declaration that in ascertaining the price to be paid for the demised premises on the purchase thereof under the option the value of a certain obligation should be taken on a particular footing; (3.) as an alternative to (2.), rectification of the lease.

On a motion by the defendant company under s. 4 of the Arbitration Act, 1889, that the proceedings in the action might be stayed in order that the questions raised therein might be referred to arbitration :—

Held, that the question as to rectification of the lease of 1901 was not one which fell within the arbitration clause.

Held, also, that the questions as to the construction of the option to purchase and rectification were so intimately connected that it was convenient that they should be dealt with together by the Court.

ARBITRATION—*continued.*

Held, therefore, that the application to stay the proceedings in the action must be refused. PRINTING MACHINERY COMPANY, LIMITED *v.* LINOTYPE AND MACHINERY, LIMITED
Warrington J. 566

ARMS—Royal Arms—Unauthorized user—Injunction – – – – – **10**
See ROYAL ARMS.

ASSETS — Company — Winding-up — Surplus assets—Distribution—Various issues **72**
See COMPANY. 8.

—— Following assets — Secured creditor — Equitable right—Delay not amounting to laches – – – – – **561**
See ADMINISTRATION. 2.

ASSURANCE COMPANY.
See under COMPANY.

ATTORNEY-GENERAL— Costs — Construction of will—Originating summons—Practice—Charitable Trusts Act, 1853 **779**
See COSTS.

AUDITORS—Duties of—Right of access to books of company—Defalcations – – **440**
See COMPANY. 2.

BANKRUPTCY—Tenant for life, Bankruptcy of —Mortgage—Covenant by trustees — Personal liability—Pleading Money-lenders Act – – – – **717**
See MONEY-LENDER.

BOOKS—Auditors, Duties of—Right of access to books of company—Defalcations
See COMPANY. 2 – – – **440**

BOUNDARY—Trespass by tipping against wall —Adjoining owners of land—Erection of wall within boundary line—Abandonment—Adverse possession – – **527**
See TRESPASS.

BRISTOL WATERWORKS ACT, 1862 – **846**
See WATER. 2.

BUILDINGS —"Building"—Gas main—Public highway—Power to break up soil of street and lay pipes—Trespass—Tunnel —Mandatory injunction – – **83**
See GAS.

—— New street—Building by-laws—Erection of houses backing on highway – **369**
See STREET.

BY-LAWS—Street—New street—Building by-laws—Erection of houses backing on highway – – – – – **369**
See STREET.

CALLS—Company—Winding-up—Set-off – **405**
See COMPANY. 7.

CANAL—Compulsory purchase—Notice to treat —Counter-notice — "House or other building or manufactory" – – **583**
See LANDS CLAUSES ACTS.

—— Fishing from towing path—Trespass—Deed —General words—Construction – **91**
See FISHERY.

CANCELLATION—Debt—Release—Will — Construction—Deduction of debts from settled legacies—Advances by testator.
See DEBT. **498**

CAPITAL—Income or—Repairing covenants— Breach—Dilapidations — Damages recovered by trustees – – – **770**
See WILL. 15.

CASES :—

—— *Adams* v. *Adams* – [1892] 1 Ch. 369, 377
Applied. *In re* WILLIAMS. WILLIAMS *v. Williams* – **[1912] 1 Ch. 399**

—— *Adkins, In re* – – (1908) 98 L. T. 667
Distinguished. *In re* MANN. FORD *v.* WARD – – – **[1912] 1 Ch. 388**

—— *Allen* v. *Embleton* – (1858) 4 Drew. 226
Principle of, applied. *In re* OWEN. SLATER *v.* OWEN – **[1912] 1 Ch. 519**

—— *Berry* v. *Gaukroger* – [1903] 2 Ch. 116
Applied. *In re* CHARLESWORTH'S TRUSTS – – – **[1912] 1 Ch. 319**

Note on *Berry* v. *Gaukroger*, see [1912] 1 Ch. at p. 322, n.

—— *Black & Co.'s Case* (1872) L. R. 8 Ch. 254, was not decided under s. 25 of the Companies Act, 1867, and is a binding authority notwithstanding the repeal of that section.
See In re LAW CAR AND GENERAL INSURANCE CORPORATION
[1912] 1 Ch. 405

—— *Bladon, In re, Dando* v. *Porter* [1911] 2 Ch. 350.
Affirmed – – – **[1912] 1 Ch. 45**

—— *Blair* v. *Duncan* – – [1902] A. C. 37
Followed. *In re* DA COSTA
[1912] 1 Ch. 337

—— *Blake* v. *Gale* – (1886) 32 Ch. D. 571
Principles stated in, followed and applied. *In re* EUSTACE
[1912] 1 Ch. 561

—— *Bourne* v. *Swan & Edgar, Ld.* [1903] 1 Ch. 211, 224.
Observations of Farwell J. in, applied. ROYAL WARRANT HOLDERS' ASSOCIATION *v.* EDWARD DEANE & BEAL, LIMITED – – – **[1912] 1 Ch. 10**

—— *Bristol Guardians* v. *Bristol Waterworks Co.* – – [1912] 1 Ch. 111
Affirmed – – **[1912] 1 Ch. 846**

—— *Bristol (Marquis of)*, *In re* [1897] 1 Ch. 946.
Followed. *In re* CAVENDISH. GROSVENOR *v.* BUTLER – **[1912] 1 Ch. 94**

CASES—*continued.*

—— *Buckton, In re* – [1907] 2 Ch. 406, 415
Followed. *In re* HALSTON. EWEN *v.* HALSTON – – **[1912] 1 Ch. 435**

—— *Burghes v. Attorney-General* [1911] 2 Ch. 139.
Affirmed in part and reversed in part. **[1912] 1 Ch. 173**

—— *Caledonian Ry. Co.* v. *Glasgow Corporation* (1901) 3 F. 526.
Followed. SCHWEDER *v.* WORTHING GAS LIGHT AND COKE COMPANY **[1912] 1 Ch. 83**

—— *Chapman* v. *Salt* – (1709) 2 Vern. 64
Considered and explained. *In re* SHIELDS – – **[1912] 1 Ch. 591**

—— *Cherry* v. *Boultbee* (1839) 4 My. & Cr. 442
Explained. *In re* PINK. PINK *v.* PINK **[1912] 1 Ch. 498**

—— *Chesterfield (Earl of)* v. *Harris* [1908] 2 Ch. 397; [1911] A. C. 623.
Applied. STAFFORDSHIRE AND WORCESTERSHIRE CANAL NAVIGATION *v.* BRADLEY – – **[1912] 1 Ch. 91**

—— *Clunies-Ross, In re* – [1912] W. N. 33
Followed. *In re* GREENWOOD. GREENWOOD *v.* SUTCLIFFE **[1912] 1 Ch. 392**

—— *Cockrell's Estate, In re* [1911] 2 Ch. 318
Affirmed – – – **[1912] 1 Ch. 23**

—— *Creswell* v. *Davidson* (1887) 56 L. T. 811
Applied. *In re* LLOYDS BANK LIMITED AND LILLINGTON'S CONTRACT **[1912] 1 Ch. 601**

—— *Darlington* v. *Hamilton* (1854) Kay, 550, 558.
Doctrine established in, applied. *In re* LLOYDS BANK LIMITED AND LILLINGTON'S CONTRACT – **[1912] 1 Ch. 601**

—— *Devonport Corporation* v. *Tozer* [1903] 1 Ch. 759, 764.
Observations of Romer L.J. in, applied. ATTORNEY-GENERAL *v.* DORIN **[1912] 1 Ch. 369**

—— *Dyson* v. *Attorney-General* [1911] 1 K. B. 410.
Followed. ATTORNEY-GENERAL *v.* DYSON – – – **[1912] 1 Ch. 158**
Referred to. BURGHES *v.* ATTORNEY-GENERAL – – **[1912] 1 Ch. 173**

—— *Earle* v. *Bellingham* (No. 2) (1857) 24 Beav. 448.
The result in, followed. *In re* WALFORD **[1912] 1 Ch. 219**

—— *Ely, In re* – – (1891) 65 L. T. 452
Not followed. *In re* HALSTON. EWEN *v.* HALSTON – – **[1912] 1 Ch. 435**

—— *Emmett, In re* – (1906) 95 L. T. 755
Questioned. *In re* BEAVAN **[1912] 1 Ch. 196**

CASES—*continued.*

—— *Fine Cotton Spinners and Doublers Association* v. *Harwood Cash & Co.* [1907] 2 Ch. 184.
Followed and applied. KINGSTON, MILLER & Co. *v.* THOMAS KINGSTON & Co. – – **[1912] 1 Ch. 575**

—— *Fowkes* v. *Pascoe* (1875) L. R. 10 Ch. 343, 350.
Dictum of James L.J. in, followed. *In re* SHIELDS – **[1912] 1 Ch. 591**

—— *Fox* v. *Fox* – (1875) L. R. 19 Eq. 286
Distinguished. *In re* HUME **[1912] 1 Ch. 693**

—— *Games* v. *Bonnor* (1884) 33 W. R. 64; 54 L. J. (Ch.) 517.
Applied. *In re* ATKINSON AND HORSELL'S CONTRACT **[1912] 1 Ch. 2**

—— *Gibson, In re* (1866) L. R. 2 Eq. 669, 672
Applied. *In re* CLIFFORD. MALLAM *v.* MCFIE – – **[1912] 1 Ch. 29**

—— *Gillins, In re* – – [1909] 1 Ch. 345
Distinguished. *In re* CLIFFORD. MALLAM *v.* MCFIE – **[1912] 1 Ch. 29**

—— *Goodlad* v. *Burnett* (1855) 1 K. & J. 341, 348.
Applied. *In re* CLIFFORD. MALLAM *v.* MCFIE – – **[1912] 1 Ch. 29**

—— *Great Central Ry. Co.* v. *Midland Ry. Co.* [1911] 2 Ch. 173.
Reversed – – **[1912] 1 Ch. 206**

—— *Gresley's Settlement, In re* [1911] 1 Ch. 358.
Distinguished. *In re* GREENWOOD. GREENWOOD *v.* SUTCLIFFE **[1912] 1 Ch. 392**

—— *Grimwood* v. *Grimwood* [1905] A. C. 124
Followed. *In re* DA COSTA **[1912] 1 Ch. 337**

—— *Gyles, In re* – – [1907] 1 I. R. 65
Dissented from on one point. *In re* WALFORD – – **[1912] 1 Ch. 219**

—— *Hall* v. *Hill* – (1841) 1 D. & War. 94
Considered and explained. *In re* SHIELDS – – **[1912] 1 Ch. 591**

—— *Heasman* v. *Pearse* (1871) L. R. 7 Ch. 275, 282, 283.
The statement of the law by James L.J. in, applied and supplemented. *In re* HAYGARTH. WICKHAM *v.* HOLMES **[1912] 1 Ch. 510**

—— *Hollis' Hospitvl (Trustees of) and Hague's Contract, In re* [1899] 2 Ch. 540.
Followed. *In re*, DA COSTA **[1912] 1 Ch. 337**

—— *Kirk* v. *Eddowes* – (1844) 3 Hare, 509
Considered and explained. *In re* SHIELDS – – **[1912] 1 Ch. 591**

CASES—*continued.*

—— *Lacon's Settlement, In re* – [1911] 2 Ch. 17
Distinguished. *In re* PYKE. BIRNSTINGL *v.* BIRNSTINGL.
[1912] 1 Ch. 770

—— *Lainson* v. *Lainson* (No. 2) (1853) 18 Beav. 7.
Followed. *In re* SALVIN
[1912] 1 Ch. 332

—— *Leahy* v. *De Moleyns* – [1896] 1 I. R. 206
Principles stated in, followed and applied. *In re* EUSTACE
[1912] 1 Ch. 561

—— *Little* v. *Kingswood Collieries Co.* (1882) 20 Ch. D. 733 ; 47 L. T. 323.
Decision of Hall V.-C. in, overruled. RAKUSEN *v.* ELLIS, MUNDAY & CLARKE
[1912] 1 Ch. 831

—— *Lord* v. *Lord* (1867) L. R. 2 Ch. 782, 789
The rule of law as laid down by Lord Cairns in, applied. *In re* WALFORD
[1912] 1 Ch. 219

—— *McGlennon's Application, In re* (1908) 25 Rep. Pat. Cas. 797.
Distinguished. *In re* VAN DER LEEUW'S TRADE MARK
[1912] 1 Ch. 40

—— *Manks* v. *Whiteley* – [1911] 2 Ch. 448
Reversed – – **[1912] 1 Ch. 735**

—— *Manning* v. *Burges* – (1663) 1 Ch. Cas. 29
Followed. WEBB *v.* CROSSE
[1912] 1 Ch. 323

—— *Mansfield (Earl of)* v. *Ogle* (1859) 4 De G. & J. 38.
Referred to. *In re* SALVIN
[1912] 1 Ch. 332

—— *Midland Ry. Co.* v. *Great Western Ry. Co.* (1873) L. R. 8 Ch. 841.
Distinguished. GREAT CENTRAL RAILWAY COMPANY *v.* MIDLAND RAILWAY COMPANY – – **[1912] 1 Ch. 206**

—— *Mills* v. *United Counties Bank, Ld.* [1911] 1 Ch. 669.
Affirmed – – **[1912] 1 Ch. 231**

—— *North* v. *Percival* – [1898] 2 Ch. 128
Doubted. VON HATZFELDT-WILDENBURG *v.* ALEXANDER
[1912] 1 Ch. 284

—— *Nunburnholme (Lord), In re, Wilson* v. *Nunburnholme* [1911] 2 Ch. 510.
Reversed – – **[1912] 1 Ch. 489**

—— *Ofner, In re* – [1909] 1 Ch. 60, 63
Followed. *In re* HALSTON. EWEN *v.* HALSTON – – **[1912] 1 Ch. 435**

—— *Perkins, In re* (1892) 67 L. T. 743; 41 W. R. 170.
Distinguished. *In re* CAVENDISH. GROSVENOR *v.* BUTLER
[1912] 1 Ch. 794

CASES—*continued.*

—— *Powell* v. *Morgan* – (1688) 2 Vern. 90
Applied. *In re* WILLIAMS. WILLIAMS *v.* WILLIAMS – **[1912] 1 Ch. 399**

—— *Rhodes* v. *Muswell Hill Land Co.* (1861) 29 Beav. 560, 563.
Applied. *In re* WILLIAMS. WILLIAMS *v.* WILLIAMS – **[1912] 1 Ch. 399**

—— *Richards* v. *Swansea Improvement and Tramways Co.* (1878) 9 Ch. D. 425, 434.
Dictum of Brett L.J. in, followed and applied. REGENT'S CANAL AND DOCK COMPANY *v.* LONDON COUNTY COUNCIL – – – **[1912] 1 Ch. 583**

—— *Ridgway* v. *Newstead* (1861) 3 D. F. & J. 474.
Principles stated in, followed and applied. *In re* EUSTACE
[1912] 1 Ch. 561

—— *Rourke* v. *Robinson* – [1911] 1 Ch. 480
Distinguished. WEBB *v.* CROSSE
[1912] 1 Ch. 323

—— *Schoole* v. *Sall* – (1803) 1 Sch. & Lef. 176
Distinguished. WEBB *v.* CROSSE
[1912] 1 Ch. 323

—— *Scott, In re* – [1901] 1 K. B. 228
Distinguished. *In re* GREENWOOD. GREENWOOD *v.* SUTCLIFFE
1912] 1 Ch. 392

—— *Scott* v. *Nixon* – (1843) 3 D. & War. 388
Applied. *In re* ATKINSON AND HORSELL'S CONTRACT – **[1912] 1 Ch. 2**

—— *Shudal* v. *Jekyll* – (1742) 2 Atk. 516
Considered and explained. *In re* SHIELDS – – **[1912] 1 Ch. 591**

—— *Slater, In re* – [1907] 1 Ch. 665, 670, 672
Applied. *In re* CLIFFORD. MALLAM *v.* MCFIE – – **[1912] 1 Ch. 29**

—— *Smith* v. *Poole* (1841) 12 Sim. 17, is no longer law. *In re* BEAVAN **[1912]1 Ch. 196**

—— *Solomon* v. *Attenborough* [1911] 2 Ch. 159
Reversed – – **[1912] 1 Ch. 451**

—— *Stamford and Warrington (Earl of), In re, Payne* v. *Grey* [1911] 1 Ch. 255
Reversed – – **[1912] 1 Ch. 343**

—— *Stamford, Spalding and Boston Banking Co.* v. *Smith* [1892] 1 Q. B. 765.
Followed. *In re* BEAVAN
[1912] 1 Ch. 196

—— *Strong* v. *Bird* – (1874) L. R. 18 Eq. 315
Distinguished. *In re* PINK. PINK *v.* PINK – – – **[1912] 1 Ch. 498**

—— *Tewkesbury Gas Co., In re, Tysoe* v. *The Company* [1911] 2 Ch. 279.
Affirmed – – **[1912] 1 Ch.**

CASES—*continued.*

—— *Thompson* v. *Sunderland Gas Co.* (1877) 2 Ex. D. 429.
Followed. SCHWEDER *v.* WORTHING GAS LIGHT AND COKE COMPANY [1912] 1 Ch. 83

—— *Toulmin* v. *Steere* – (1817) 3 Mer. 210
Followed. MANKS *v.* WHITELEY [1912] 1 Ch. 735

—— *Trustees of Hollis' Hospital and Hague's Contract, In re*, [1899] 2 Ch. 540.
Followed. *In re* DA COSTA [1912] 1 Ch. 337

—— *Walter* v. *Rumbal* – (1695) 1 Ld. Raym. 53
Followed. JARVIS *v.* HEMMINGS [1912] 1 Ch. 462

—— *Waring* v. *Ward* – (1802) 7 Ves. 332
Referred to. MILLS *v.* UNITED COUNTIES BANK, LIMITED [1912 1 Ch. 281

—— *Wiltshire* v. *Smith* – (1744) 3 Atk. 89
Followed. WEBB *v.* CROSSE [1912] 1 Ch. 323

CHARGING ORDER—Solicitors' costs.
See under SOLICITOR.

CHARITY — *National School — Conveyance of Site under the Schools Sites Act*, 1841 (4 & 5 *Vict. c.* 38)—*Trust for Education of the Poor—School for promoting Education in the Principles of the Established Church—General Intention coupled with Particular Mode — Failure of Particular Mode—Cy-près.*

Land was conveyed by a charitable donor under the Schools Sites Act, 1841, upon trust to permit the buildings to be erected thereon to be for ever used for a school for the education of children and adults or children only of the labouring, manufacturing, and other poorer classes in a certain district. The school was to be in union with and conducted according to the principles of the National Society for Promoting the Education of the Poor in the Principles of the Established Church. The trust deed provided that the school might be used for Sunday school purposes under the control of the clergyman of the parish, and in other respects the management was vested in the clergyman and four members of the Church of England. The school erected on the land was used in accordance with the trusts until 1905, when, in consequence of the inability of the trustees to satisfy the requirements of the education authorities under the Education Act, 1902, it was closed.

In an action for a scheme to regulate and manage the charity :—

Held by Cozens-Hardy M.R. and Fletcher Moulton L.J. (Buckley L.J. dissenting), that the special trusts for carrying on a national school in connection with the Church of England having failed the premises ought, according to the doctrine of cy-près, to be appropriated and used generally for the education (apart from denominational religious instruction) of the class intended to be benefited. It would be contrary to the Schools Sites Act, 1841, to allow the trustees to let the school at a rent to be applied for Church purposes generally. That Act was not limited to education which was both "religious and useful," but extended to purely secular education.

Decision of Swinfen Eady J. reversed.

Per Buckley L.J. : To a charitable endowment for education coupled with a particular denominational religion, education not coupled with religion, or coupled with religion not of that denomination, is not cy-près. ATTORNEY-GENERAL (GLAMORGAN COUNTY COUNCIL) *v.* PRICE – – – – – – **C. A. 667**

CHARITY—*continued.*

2.—— *Will—"The Ormond Home for Nurses"—Maternity Nurses for Poor People—Testatrix herself the Home—Charitable Intent—No Lapse—Good Charitable Gift.*

The testatrix bequeathed her estate to "The Ormond Home for Nurses," and added directions for carrying on the home "for the next few months."

The testatrix was a qualified midwife, who for moderate fees attended maternity cases among the working classes and poor people of Chelsea. She employed at weekly salaries several other trained midwives, who resided with her and attended cases as required, the fees being received by the testatrix. She also received a few pupils and trained nurses desirous of obtaining midwifery experience, who resided with her, and the fees paid by the former and earned by the latter were received by the testatrix. By means of the fees so paid and her own small income she just managed to carry on her establishment, which she called "The Ormond Home for Nurses" :—

Held, that although there was no person or institution which could properly be called "The Ormond Home for Nurses," the testatrix clearly intended something to be carried on for the benefit of the patients requiring nursing, and that in the circumstances there was a good and valid charitable gift, and a scheme was directed. *In re* WEBSTER. PEARSON *v.* WEBSTER **Joyce J. 106**

—— Costs—Attorney-General—Construction of will—Originating summons—Practice—Charitable Trusts Act, 1853 – **779**
See COSTS.

—— Real estate—Absolute gift with common law condition subsequent—Void—Rule against perpetuities—Gift over – **337**
See WILL. 2.

COLONIAL STOCK ACT, 1900 – – **55**
See TRUSTEE. 2.

COLONY — Trustees — Investment — Stock or securities of any "British colony or dependency"—Meaning of "colony" and "dependency" – – – **55**
See TRUSTEE. 2.

COMPANY — *Assurance Company — Subsidiary Company — Principal Company — Transfer of Assurance Business — Meaning — Purchase of Bulk of Shares—Appointment of Directors —*

COMPANY—*continued.*

Guarantee of Policies — Mutual Reinsurance Treaty — Assurance Companies Act, 1909 (9 *Edw.* 7, *c.* 49), *s.* 16.

The mere fact that assurance company A obtains complete control of assurance company B by purchasing the bulk of its shares, appointing its directors, guaranteeing its policies, and entering into a contract of mutual reinsurance does not amount to a transfer of assurance business from company B to company A so as to constitute company B a subsidiary company and company A a principal company within s. 16 of the Assurance Companies Act, 1909. *In re* LANCASHIRE PLATE GLASS, FIRE AND BURGLARY INSURANCE COMPANY - **Swinfen Eady J. 35**

2. —— *Auditors—Duties of—Right of Access to Books of Company — Defalcations—Alleged Negligence of Auditors — Action by Auditors claiming Access to Books—Interlocutory Application for Order for Access—Discretion of Court — Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 112, *sub-ss.* 1, 6 ; *s.* 113, *sub-ss.* 1, 2.

The secretary of a company having been guilty of defalcations, by which loss was occasioned to the company, the directors alleged that the company's auditors had by negligence in the performance of their duties conduced to these defalcations, and refused to give them access to the company's books for the purposes of audit. The auditors thereupon brought an action against the company and the directors, claiming a declaration that they, as auditors, were entitled at all times to access to the company's books, and an order for access thereto. The time having arrived when, in the ordinary course, the audit of the company's accounts by the plaintiffs should be proceeding for the purposes of the next annual general meeting, the plaintiffs made an interlocutory application in the action for an order that the defendants should give them access to the books, and Eve J. made a mandatory order to that effect on the ground that the auditors had a statutory right of access to the books. On appeal to the Court of Appeal :—

Held (by Farwell L.J. and Kennedy L.J.), that it was a question for the judicial discretion of the Court whether the right of access to the books claimed by the plaintiffs should be enforced by a mandatory order, and that such an order ought not, under the circumstances of the case, to have been made upon an interlocutory application, and without any steps to ascertain whether the company were desirous that the plaintiffs should continue to act as auditors or not, and therefore the appeal must be allowed. CUFF *v.* LONDON AND COUNTY LAND AND BUILDING COMPANY, LIMITED - - - **C. A. 440**

3.——*Debenture — Construction — Principal repayable "on or after" a specified Date—Power of Company to repay by Drawings—Due Date of Principal—Inadmissibility of Prospectus to explain Meaning of Debenture—Provision void for Repugnancy.*

Appeal by the company from the decision of Parker J. [1911] 2 Ch. 279.

COMPANY—*continued.*

The Court (Cozens-Hardy M.R., Fletcher Moulton L.J., and Farwell L.J.) without calling upon counsel for the respondent dismissed the appeal. *In re* TEWKESBURY GAS COMPANY. TYSOE *v.* THE COMPANY - - - **C. A. 1**

4.——*Debenture-holders' Action — Receiver and Manager — Duties — Repudiation of Company's Contracts—Practice.*

It is the duty of the receiver and manager of the property and undertaking of a company to preserve the goodwill as well as the assets of the business, and it would be inconsistent with that duty for him to disregard contracts entered into by the company before his appointment.

Where therefore a receiver and manager of the undertaking and property of a colliery company had been appointed in a debenture-holders' action against the company, the Court declined to authorize him to repudiate the company's forward contracts for the supply of coal, notwithstanding that since those contracts were made the price of coal had risen, and if the contracts were disregarded a much larger sum would be obtained for the coal.

Decision of Eve J. affirmed *In re* NEWDIGATE COLLIERY, LIMITED. NEWDEGATE *v.* THE COMPANY - - - - **C. A. 468**

5.——*Dissolution—Practice—Declaring Dissolution void—Person interested—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 223.

The S. company went into liquidation for the purpose of reconstruction, and by an agreement dated March 31, 1909, between the S. company and its liquidator and a new company with the same name the new company agreed to take over all the assets and liabilities of the old company and to indemnify the old company against such liabilities. The old company held certain shares in A. S., Limited, upon which there was a liability for uncalled capital, but these shares were not transferred to the new company. Meetings of creditors were held, but no notice was sent to A. S., Limited. The final meeting in the voluntary winding up of the old company was filed in compliance with the Companies (Consolidation) Act, 1908, s. 195, on June 26, 1910. The old company became dissolved, therefore, at the expiration of three months from that date. In March, 1911, A. S., Limited, discovered the facts as to the winding-up. In April they made a further call of 1*s.* per share upon the shares originally held by the old company. They made persistent attempts to induce the new company to pay the call or admit their liability, but the new company refused. On December 9, 1911, A. S., Limited, gave notice of this motion under s. 223 of the Companies (Consolidation) Act, 1908, that the dissolution of the old company might be declared to have been void :—

Held, that A. S., Limited, were persons interested within s. 223 of the Act ; that they had not been guilty of any such laches as would disentitle them to proceed ; and that the dissolution must be declared to have been void. *In re* SPOTTISWOODE, DIXON & HUNTING, LIMITED **Neville J. 410**

COMPANY—*continued.*

6.——*Meetings—Statutory Meeting—Notice—Shares—Allotment as fully paid—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 65.

The T. company was incorporated as a company limited by shares under the Companies (Consolidation) Act, 1908, on January 3, 1911, and, being a private company, it was entitled to commence business immediately on its incorporation. Its articles of association provided that the statutory meeting of the company should be held at such time (within the statutory limit) and at such place as the directors should determine, and that the notices convening general meetings of the company (whether ordinary or extraordinary) must specify the general nature of the business to be transacted thereat.

The T. company held only two general meetings—one of which, held on January 30, 1911, was for the purpose of passing, and the other, on February 14, 1911, was for the purpose of confirming, a special resolution for the increase of the company's share capital. The meeting of January 30 was held too soon to be the statutory meeting of the company; and the notices of the meeting of February 14 referred only to the business of confirming the resolution passed at the previous meeting; but this meeting, so far as its date was concerned, might have been the statutory meeting. (See s. 65 of the Act of 1908.)

The L. company on February 13, 1911, entered into an agreement with one Crossman for a lease to the L. company of land for fifty years from September, 1910, at a yearly rent of 120*l.*, under which lease the L. company was to erect a theatre on the site to be demised within a certain time, and the lease was not to be granted till this was done. On March 15, 1911, the L. company entered into an agreement with the T. company whereby it was agreed that the T. company should buy the benefit of the agreement of February 13, 1911, and that the L. company should with all convenient speed build and equip a theatre on the site, the inclusive price for the benefit of the agreement and the building and equipment being agreed at 9000*l.*, to be satisfied by the allotment to the L. company of 36,000 fully-paid shares of 5*s.* each in the T. company, which were to be allotted on the sealing of the agreement.

The L. company proceeded with the erection of the theatre, but went into voluntary liquidation before its completion and were unable to complete it. The landlord afterwards re-entered on the land, and the agreement of February 13, 1911, was at an end.

The liquidator of the L. company agreed to sell some of the 36,000 paid-up shares to the defendants, and the agreement provided that it should at the option of the defendants become void if it should be found that the requirements of the Companies (Consolidation) Act, 1908, had in any way been infringed by the T. company.

By a letter dated October 5, 1911, the defendants exercised their option to avoid the agreement, and (in an action by the L. company and their liquidator for specific performance of an agreement to sell the shares) they contended

COMPANY—*continued.*

(1.) that no statutory meeting of the company had been held; and (2.) that it was ultra vires the T. company to allot the shares as fully paid, if they were in fact allotted, having regard to the fact that that company derived no benefit from the agreement under which they were to be allotted:—

Held, that if the meeting of February 14, 1911, was intended to be the statutory meeting, it was not properly convened, for, if it was to be the statutory meeting, the notices convening it should have so stated, and therefore the T. company had not in fact complied with the requirements of s. 65 of the Act as to the statutory meeting.

Semble, there is no objection to an agreement by a limited company that a debt which it presently owes shall be satisfied by the allotment of fully-paid shares of the same nominal amount; and the contract of March 15, 1911, could and should be read as a contract to build a theatre in consideration of 9000*l.* payable upon the sealing of the agreement, with a provision that the 9000*l.* should be satisfied by the issue of fully-paid shares to that amount, and so read, was valid. GARDNER *v.* IREDALE – **Parker J. 700**

7. ——*Winding-up—Calls—Set-off.*

An agreement between a director of a company and the company, that any moneys which the director may pay under a guarantee of the company's overdraft at the bank shall be treated as payments made in advance of future calls, though such an agreement is within the company's powers and validly made, will not enable the director to set off moneys so paid against a subsequent call made by the liquidator in a compulsory winding-up.

Black & Co.'s Case (1872) L. R. 8 Ch. 254, was not decided under s. 25 of the Companies Act, 1867, and is a binding authority notwithstanding the repeal of that section. *In re* LAW CAR AND GENERAL INSURANCE CORPORATION **Neville J. 405**

8. ——*Winding-up—Surplus Assets—Distribution—Various Issues—No Priority as to Capital—Preference and Ordinary Stock created and issued as such—Preference and Ordinary Stock converted from Shares—Bonus Preference Stock issued on Conversion to maintain Dividend—Partly-paid Ordinary Shares—Partly-paid Ordinary Stock created and issued as such.*

The original capital of a company consisted of preference and ordinary shares, the preference shares having a fixed dividend but no priority as to capital.

The company having power to convert its paid-up shares into stock converted its ordinary shares into ordinary stock at face value, but in converting its preference shares into preference stock bearing a lower rate of interest it gave the holders extra bonus stock to maintain their former dividends.

The company also made direct issues of fully-paid preference and ordinary stock for cash without going through the formality of first issuing fully-paid shares and converting them.

COMPANY—*continued.*

The company also made direct issues of partly-paid ordinary shares and partly-paid ordinary stock for cash.

All the holders were placed on the register and received dividends.

Many years after these issues were made the company was wound up voluntarily, and after paying all the creditors the liquidator had a balance of surplus assets for distribution among the members :—

Held, (*a*) that, having regard to the lapse of time, the irregularity in the direct issues of the fully-paid preference and ordinary stock must be treated as waived, and the holders were entitled to rank for the full amount of their holding ;

(*b*) That the original holders and transferees of preference stock converted from fully-paid preference shares could only rank for the amount representing conversion at face value and not for the bonus stock, which was wholly ultra vires and must be treated as non-existent ;

(*c*) That the holders of partly-paid shares were entitled to rank for the amount paid and were subject to a call for equalization ;

(*d*) That the original holders and transferees of partly-paid ordinary stock were not entitled to rank at all, as their stock was wholly ultra vires and must be treated as non-existent ;

(*e*) That no call could be made on the holders of the bonus or partly-paid stock. *In re* HOME AND FOREIGN INVESTMENT AND AGENCY COMPANY - - - **Swinfen Eady J. 72**

—— Guarantee of debenture issue—Re-insurance of risk—Liquidation of insurance company — Liability of re-insuring company - - - - - **138**
See INSURANCE (GUARANTEE).

—— Name, Similarity of—Deception—Right of individual to trade in his own name—Transfer of use of name to company
See TRADE NAME. **575**

—— Will—Legacy—Specific bequest of shares—Reconstruction of company—Whether specific bequest adeemed - - **828**
See WILL. 7.

COMPENSATION — Improvements—Landlord's written consent—Liability - **479**
See VENDOR AND PURCHASER. 1.

COMPULSORY PURCHASE—Notice to treat—Counter-notice — Canal — "House or other building or manufactory" - **583**
See LANDS CLAUSES ACTS.

CONDITION—Partial forfeiture—Whole costs of any administration action commenced by a beneficiary to be paid out of his share—Action based on wilful default
See WILL. 3. **399**

CONTINGENT—Vested or—Severance—Legacy—Gift of capital and accumulations of income at twenty-six—Previous trusts
See WILL. 6. **489**

CONTRACT — Company — Debenture-holders' action—Receiver and manager—Duties—Repudiation of company's contracts
See COMPANY. 4. **468**

—— Vendor and purchaser.
See under VENDOR AND PURCHASER.

CONTRACT OF SERVICE—Schoolmistress, Dismissal of—Notice of determination—Powers of managers—Consent of local education authority - - - **816**
See SCHOOLS.

CONVERSION—Will—Trust for conversion with power to postpone — Unauthorized investments retained—Leasehold sublet at a loss—Income - - - **519**
See WILL. 16.

CONVEYANCING AND LAW OF PROPERTY—Lease by mortgagor in possession—Special extension of statutory power—Non-delivery of counterpart—Validity of lease - - - - - **789**
See MORTGAGE. 2.

—— Open contract — "Leasehold house" — Underlease—Head lease—Payment of deposit—Repayment - - - **601**
See VENDOR AND PURCHASER. 3.

COPYRIGHT — *Registered Design — Drawing shewing Conception as to Mode or Principle of Construction—Patents and Designs Act*, 1907 (7 *Edw.* 7, *c.* 29), *ss.* 49, 60, 93.

A design in order to be registrable under s. 49 of the Patents and Designs Act, 1907, must be some conception or suggestion as to shape, configuration, pattern, or ornament, and be capable of being applied to an article in such a way that the article to which it has been applied will shew to the eye the particular shape, configuration, pattern, or ornament the conception or suggestion of which constitutes the design. The representation accompanying an application for registration must be something in the nature of a drawing or tracing, by means of which the conception or suggestion constituting the design may be imparted to others, so that persons looking at the drawing can form a mental picture of the shape, configuration, pattern, or ornament of the article to which the design has been applied ; but a conception or suggestion as to a mode or principle of construction, though in some sense a design, is not registrable.

Inasmuch, however, as the mode or principle of construction of an article may affect its shape or configuration, the conception of such a mode or principle of construction may well lead to a conception as to the shape or configuration of the completed article, and a conception so arrived at may, if sufficiently definite, be registered under the Act.

Quære, whether, where the conception thus arrived at is not a definite conception as to shape or configuration, but a conception only as to some general characteristic of shape or configuration necessitated by the mode or principle of construction, the definite shape or configuration being consistently with such mode or principle

COPYRIGHT—*continued.*

capable of variation within wide limits, the drawing is registrable.

A drawing was registered as a design in respect of vehicle wheels, the novelty in which was said to consist of the disposition of the tyre rim in relation to the hub and in the cross-sectional arrangement of three sets of spokes, such disposition and arrangement being shewn in the drawing, which was a cross-sectional drawing of a vehicle wheel on the longitudinal central plane—a conventional drawing such as would be used by an engineer to indicate how the wheel was to be constructed as regards the disposition of the wheel in relation to hub and the arrangement of the spokes—but the drawing did not shew what would in fact be seen if the wheel were cut on the longitudinal central plane. A competent mechanician could have easily constructed from the drawing a number of wheels whose configuration, from whatever standpoint they were looked at, would have little if anything in common except the disposition of the wheel in relation to the hub and the cross-sectional arrangement of the spokes. On the other hand, from each and every wheel so constructed a draughtsman, with a competent knowledge of the conventions of mechanical drawing, if asked to draw a cross-section on the longitudinal central plane shewing this disposition of the rim in relation to the hub and the cross-sectional arrangement of the spokes, would inevitably (without actually cutting the wheel) arrive at the drawing in question.

In an action by the owner of the registered design for an alleged infringement, a drawing of the machines made by the defendants, which were alleged to be infringements of the registered drawing, shewed differences from the registered drawing, which, judging by the eye alone, were substantial differences, as a person looking at the drawings would see that the cross-sectional arrangement of the spokes was not substantially the same in each unless he had in his mind a mode of construction rather than a conception of shape or configuration, and would not say that there was an imitation unless he were judging both drawings by the method of construction involved rather than by the appearance they presented to the eye :—

Held, therefore, that either the registration was bad as an attempt to protect a mode of construction, or that there had been no infringement, and that the action failed. PUGH *v.* RILEY CYCLE COMPANY – **Parker J. 613**

COSTS—*Attorney-General—Construction of Will—Originating Summons—Practice—Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *s.* 20—*Rules of the Supreme Court*, 1883, *Order* LV., *r.* 3.

Where the Attorney-General acting under a certificate issued to him under s. 20 of the Charitable Trusts Act, 1853, takes out an originating summons for the determination of a question of construction relating to charitable bequests under a will, as representing the objects of the charity, he is in the same position as any other beneficiary and is entitled to costs out of the estate. *In re* CARDWELL. ATTORNEY-GENERAL *v.* DAY – – **Warrington J. 779**

COSTS—*continued.*

—— Condition — Partial forfeiture — Whole costs of any administration action commenced by a beneficiary to be paid out of his share—Action based on wilful default – – – – – **396**
See WILL. 3.

—— Lunatics—Summons as to property— Separate summonses—Duplicate evidence—Consolidation – – – – **730**
See LUNACY.

—— Mortgage.
See under MORTGAGE.

—— Solicitors' costs.
See under SOLICITOR.

—— Unsuccessful litigant — Practice — Will — Construction – – – – **435**
See WILL. 9.

COUNTERPART—Lease by mortgagor in possession—Special extension of statutory power—Non-delivery of counterpart—Validity of lease – – – **789**
See MORTGAGE. 2.

COVENANT — After-acquired property — Covenant to settle — Hotchpot clause — Settled fund—Trusts by reference – **794**
See SETTLEMENT.

—— Breach of lessee's covenant — Right to sue—Assignee of reversion—Vesting by private Act of Parliament – **191**
See LANDLORD AND TENANT. 1.

CROWN—Valuation of land—Declaratory judgment—Relief against Crown **158, 173**
See REVENUE. 4, 5.

CUSTOMS AND INLAND REVENUE.
See under REVENUE.

CY-PRÈS—Conveyance of the site under Schools Sites Act, 1841 – – – – **667**
See CHARITY. 1.

DAMAGES — Ancient lights — Obstruction — Measure of damages—Site value – **291**
See LIGHT.

DEBENTURE-HOLDERS—Company.
See under COMPANY.

DEBENTURES—Company.
See under COMPANY.

DEBT — *Release — Cancellation — Will — Construction — Deduction of Debts from Settled Legacies — Advances by Testator — Entries in Testator's Ledger—Continuing Intention—Appointment of Debtor as Executor.*

A testator during his life made advances of 5800*l.* and 9800*l.* to his two sons-in-law, R. and M., respectively. In February, 1908, R. was adjudicated bankrupt, with assets nil, and he had not obtained his discharge. In the testator's ledger at the foot of R.'s account was an

DEBT—*continued.*

undated entry "This debt is cancelled as altogether bad, debtor being bankrupt." With respect to M.'s debt there was an entry in the ledger in 1905 that 5000*l.* had been given of the debt for an object arranged with the wife of M., and in June, 1909, there was a further entry "This debt is absolutely cancelled from this date, viz. 4800*l.* and interest. Edward Pink." No interest was ever paid by R.

By his will, made in March, 1908, the testator appointed M. to be one of his executors, and settled a sum of 20,000*l.* and one fourth of his residue upon each of the wives of R. and M. and their children, and he directed that the debt of R. should not be called in for five years if interest was paid, but if not, or in the event of the bankruptcy of R., the whole principal and interest should immediately become payable. In the case of M. the testator directed that if the wife of M. should die within seven years of his death any sum due from M. should be absolutely extinguished, and he declared that any loss sustained in respect of any indebtedness of either R. or M. should be credited as a loss to the trust legacy of 20,000*l.* to the wife of the debtor, and not as a loss to his residuary estate.

Upon a summons by the legal personal representatives of the testator to have it determined whether these debts were still due:—

Held, (1.) that as to the debt of R. the memorandum in the ledger could not operate as a release, nor had the bankruptcy of R. put an end to his indebtedness.

Cherry v. *Boultbee* (1839) 4 My. & Cr. 442, explained.

(2.) That as to the debt of M. there was not sufficient evidence of an intention by the testator to make a gift, but even if there were such an intention, or an imperfect gift, it was not perfected by the appointment of M. as executor, and the case did not come within *Strong* v. *Bird* (1874) L. R. 18 Eq. 315.

Held, accordingly, that neither of the debts had been released or cancelled, but both were still due. The whole of the indebtedness of R. must be treated by the executors as a loss, and deducted from the settled legacy to his wife; and if any loss eventually arose in respect of the debt of M., such loss would fall upon the settled legacy to his wife. *In re* PINK. PINK *v.* PINK – – – – – **Eve J. 498**

—— Statute-barred debt—Executors—Acknowledgment — Affidavit for probate — Limitation – – – – **196**
See ADMINISTRATION. 1.

DECLARATORY JUDGMENT — Valuation of land—Relief against Crown – **158, 173**
See REVENUE. 4, 5.

DEDICATION—Evidence of—Highway.
See under HIGHWAY.

DELAY—Following assets—Secured creditor—Equitable right—Delay not amounting to laches – – – – – **561**
See ADMINISTRATION. 2.

DEMONSTRATIVE LEGACY—Fund wholly reversionary—No time for payment fixed by will—Time from which interest runs – – – – – – **219**
See WILL. 4.

"**DEPENDENCY**" — Trustees — Investment — Stock or securities of any "British colony or dependency"—Meaning of "colony" and "dependency" – **55**
See TRUSTEE. 2.

DEPOSIT—Open contract—"Leasehold house"—Underlease—Head lease—Payment of deposit—Repayment – – – **601**
See VENDOR AND PURCHASER. 3.

DESIGN—Registered design—Drawing shewing conception as to mode or principle of construction – – – – **613**
See COPYRIGHT.

DETERMINATION—Tenancy "for two years certain and thereafter from year to year"—When determinable – **610**
See LANDLORD AND TENANT. 3.

DIRECTORS—Company.
See under COMPANY.

DISMISSAL—Schoolmistress—Contract of service—Notice of determination—Powers of managers – – – – **816**
See SCHOOLS.

DISSOLUTION—Company.
See under COMPANY.

DUTY—Inland Revenue.
See under REVENUE.

EDUCATION.
See under SCHOOLS.

ENTRIES—Debt—Release — Cancellation—Will—Construction — Deduction of debts from settled legacies — Advances by testator—Entries in testator's ledger
See DEBT. **498**

EQUITY OF REDEMPTION—Mortgage.
See under MORTGAGE.

ESTATE DUTY—Inland Revenue.
See under REVENUE.

ESTATE TAIL—Limitations after—Legal and beneficial interests—Period of ascertainment – – – – – **510**
See WILL. 11.

EVIDENCE—Highway—Evidence of dedication
See HIGHWAY. **417**

—— Lunatics—Summons as to property—Separate summonses——Duplicate evidence—Consolidation—Costs – – **730**
See LUNACY.

—— Will — Construction — Name — Misdescription — Gift to non-existing person—Latent ambiguity—Evidence—Admissibility – – – – – **435**
See WILL 9.

EVIDENCE—*continued.*

—— Will—Legacy — Ademption — Evidence of intention—Admissibility of letter **591**
See WILL. 8.

EXECUTOR—*Administration—Right to pledge Personal Chattels—Pledge by Executor many Years after Death of Testator—Payment of Debts—Notice of Executorship to Pledgee.*

A testator, who died in 1878, by his will, after appointing two persons executors and trustees and giving pecuniary legacies, gave his residuary estate to his trustees upon trust for sale and distribution as therein mentioned. In 1892 one of the executors, without the knowledge of his co-executor, pawned articles of plate belonging to the testator's estate with the defendants, who had no notice that he was not the absolute owner thereof, and he misapplied the money advanced upon them to his own purposes. At the date of the pledge all the testator's legacies and debts so far as they were known had been paid, but the residuary estate had not been completely realized or distributed. On the death of the pledgor the transaction was discovered, and an action was brought by his co-executor and a new trustee against the pawnbrokers to recover the plate :—

Held (reversing the decision of Joyce J. [1911] 2 Ch. 159), that inasmuch as the pledgor had not purported to act as executor, and the defendants had no notice that he was executor, the latter had no title to the plate and must deliver it up to the plaintiffs.

SOLOMON *v.* ATTENBOROUGH – **C. A. 451**

—— Debt—Release—Cancellation — Will—Construction — Appointment of debtor as executor – – – – – **498**
See DEBT.

—— Foreign property—Separate executors of—Estate duty — Liability of English executors – – – – **540**
See REVENUE. 2.

—— Statute-barred debt — Acknowledgment—Affidavit for probate – – – **196**
See ADMINISTRATION. 1.

FINANCE ACTS.
See under REVENUE.

FISHERY—*In gross, or appurtenant—Canal—Fishing from Towing Path—Trespass—Deed—General Words — Construction — Staffordshire and Worcestershire Canal Act*, 1766 (6 *Geo.* 3, *c. xcvii.*), *s.* 74.

Under an Act of 6 Geo. 3, c. xcvii., authorizing the construction of a canal there was granted (by s. 74) to each owner of land through which the canal was made the sole, several, and exclusive right of fishing in so much of the canal as was made in, over, or through his land ; but the right of fishery thereby granted was to be exercised so that the canal, towing paths, banks, and other works should not be prejudiced or obstructed. Under a deed of March 31, 1845, a certain manor and estate through which the canal passed became vested in the Earl of S. ; there was no express grant of this particular right of fishery, but there were general words in the deed passing all fisheries, profits, advantages, and appurtenances whatsoever to the manor and estate respectively belonging, or in anywise appertaining.

By a lease of July 23, 1910, the Earl of S. granted to an angling club, of which the defendant was a member, the exclusive right to fish for and take away all fish in a specified portion of the canal, at an annual rent, and the lessees covenanted so to exercise their rights as not to prejudice or obstruct the towing paths, banks, and other works of the canal. The plaintiffs having brought an action to test a claim by the defendant to fish in the canal from the towing path, without their consent :—

Held, (1.) that, having regard to all the circumstances, s. 74 of the Act conferred upon the grantees of the exclusive fishery a right to use the towing paths and banks of the canal for the exercise of that right.

But *held*, (2) that the right, being one to take fish without stint, and without any relation to the needs of the land in respect of which the right was granted, was not a right appurtenant, or capable of being made appurtenant, to the land, but a right in gross, and not capable of passing under the general words of the deed of March 31, 1845.

Earl of Chesterfield v. *Harris* [1908] 2 Ch. 397 ; [1911] A. C. 623, applied.

Held, (3.) that if the right of fishery had passed under the deed of March 31, 1845, it could properly have been made the subject of a lease.

Held, therefore, in the result, that the plaintiffs were entitled to a declaration that the defendant was not entitled to fish from the towing paths of the canal belonging to the plaintiffs without their consent, and that an injunction must be granted to restrain the trespass. STAFFORDSHIRE AND WORCESTERSHIRE CANAL NAVIGATION *v.* BRADLEY – – **Eve J. 91**

FOREIGN PROPERTY—Separate executors of—Estate duty — Liability of English executors – – – – – **540**
See REVENUE. 2.

FOREIGN WORDS—Use of—Trade mark **40**
See TRADE MARK. 1.

FORFEITURE—Condition—Partial forfeiture——Will—Costs—Action based on wilful default. – – – – – **399**
See WILL. 3.

GAS—*Road—Public Highway—Power to break up Soil of Streets and lay Pipes—Trespass——Tunnel—"Building" — Gas Main — Mandatory Injunction—Statute — Construction — Gasworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 15), *ss.* 6, 7, 10—*Worthing Gas Act*, 1907 (7 *Edw.* 7, *c. lxxxix.*), *ss.* 5, 7.

By s. 6 of the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), the undertakers were authorized to open and break up the soil of streets and

GAS—*continued.*

bridges within the limits of their special Act, and to open and break up any sewers, drains, or "tunnels" under such streets, &c., and to lay down pipes therein for supplying gas. But s. 7 provided that nothing therein should authorize the undertakers "to lay down or place any pipe or other works into, through, or against any building, or in any land, not dedicated to public use, without the consent of the owners and occupiers thereof."

Sect. 10 provided that any street, bridge, sewer, drain, or tunnel so broken up should be "reinstated" and made good without delay.

The plaintiff, who was the owner of land on either side of a public highway, bored a tunnel thereunder to be used as a passage way. It was constructed of brick, the roof consisting of girders embedded in cement concrete 12 inches thick, and resting upon brickwork 18 inches thick. The defendant company, relying on their statutory powers under the Gasworks Clauses Act, 1847, and without the consent of the plaintiff, excavated the road over the tunnel, carried away part of the cement concrete, and laid down two gas mains, one of which practically rested upon the roof of the plaintiff's tunnel:—

Held, (1.) that the tunnel was a "building" within s. 7 of the Gasworks Clauses Act, 1847.

Thompson v. *Sunderland Gas Co.* (1877) 2 Ex. D. 429, followed.

Held, (2.) that the structure was not a tunnel within the meaning of s. 6 with which the defendants could interfere.

Caledonian Ry. Co. v. *Glasgow Corporation* (1901) 3 F. 526, followed.

Held, (3.) that if it were a tunnel within s. 6 the obligation to restore it to the status quo ante under s. 10 had not been complied with.

Held, therefore, that a mandatory injunction would be granted to abate the trespass by the defendants in laying the pipes into, through, or against the plaintiff's building. SCHWEDER *v.* WORTHING GAS LIGHT AND COKE COMPANY
Eve J. 83

GUARANTEE — Assurance company — Transfer of assurance business — Meaning — Guarantee of policies - - - 35
See COMPANY. 1.

—— Insurance.
See under INSURANCE (GUARANTEE).

HEIRLOOMS — Interest — Tenant for life — Remainderman - - - - 251
See SETTLED LAND. 1.

HIGHWAY—*Evidence of Dedication—Highway Act*, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 23.

At the trial of an action and information in which a declaration was claimed that the portion of Shire Lane between Swillett Corner and Newlands Corner was a public highway for carts and carriages repairable by the defendant council, it was admitted that Shire Lane commenced towards the south in the main road from Rickmansworth to Uxbridge, its extreme limit northward being at a point where the lane

HIGHWAY—*continued.*

formed a junction with an old road called Greener Street, which was a public highway for all purposes repairable by the inhabitants at large.

Between the two extreme limits of the Rickmansworth to Uxbridge road on the south and Greener Street on the north, running southwards from Greener Street, was Swillett Corner, and between these points Shire Lane was admitted also to be a public road for all purposes similarly repairable. From Swillett Corner running south to Newlands Corner, Shire Lane was admitted by the defendant council only to be a public footpath. From Newlands Corner southwards for a considerable distance, and again between two points still further south, Shire Lane was once more a highway for all purposes, repairable by the inhabitants at large.

Shire Lane varied considerably in width, and was bounded on each side by the banks and ditches of old inclosures, the centre line between the ditches forming until recently the county boundary, and the boundary between adjacent parishes and manors and ecclesiastical districts. Although very narrow in places, the lane was throughout its entire length sufficiently wide to admit of vehicular traffic. It was an open road without cross-gates, and formed a convenient route between Denham on the south and Chenies on the north.

The lane was an old one, one map shewing that it existed physically in 1788. At the beginning of the nineteenth century in one part of the lane a strip of land extending from the old ditch on the east to beyond the centre line of the lane had been enclosed, and the person enclosing it was admitted tenant of the manors on either side of the county boundary. In most parts of Shire Lane there existed cart ruts, pointing to its use for cart traffic till comparatively recent times, but the ruts were consistent with a private user. At one time the lane had been a metalled road, the metalling throughout being of sufficient width to accommodate carts and carriages. In and prior to 1865, and for some years afterwards, the land was in as good a state of repair, so far as metalling was concerned, as most of the other roads in the neighbourhood, and there was then no difficulty in driving a cart or carriage throughout its entire length.

There was no direct evidence how or when the portions admitted to be highways were dedicated to the public or became repairable, although they existed physically as roads before the passing of the Highway Act, 1835, and the evidence was consistent with dedications having been made long before 1835; but there was no evidence that these portions of Shire Lane were roads to which s. 23 of the Act of 1835 applied if they were dedicated after the passing of the Act, or whether the formalities required by that section had been complied with, and there was no evidence of the private user of the lane or pointing to its being a mere occupation road or otherwise inconsistent with its having been dedicated to the public for all purposes.

The evidence of actual user of the lane by the public was meagre (owing probably to the

HIGHWAY—*continued.*

facts (*a*) that for many years the lane between the points in question had been so overgrown with underwood as to make its use for carts or carriages difficult if not impossible, and (*b*) that even before this growth the land had been little used because the country through which it passed was then sparsely populated), but the evidence of living witnesses (which went back to 1865) shewed that they had driven through the lane as of right, and had been told by persons since deceased that Shire Lane was a public highway both on foot and with carts and carriages, and also that by general reputation the lane was a highway.

There was also evidence from which it appeared that the surveyors of the local authorities interested and those authorities had, in correspondence and in arrangements as to the repair of Shire Lane, and in or in relation to proceedings before the Local Government Board, shewn no trace of having considered the portion of Shire Lane between Swillett Corner and Newlands Corner—the portion in dispute—as being in any different condition, with regard to liability for repair or otherwise, from any other portion of the lane.

The only evidence against public liability to repair Shire Lane was that its repair had been neglected, and the only evidence of dedication for foot passengers only was that in recent years no cart or carriage traffic had been possible by reason of that neglect:—

Held, (1.) that the evidence, positive and negative, justified a finding that Shire Lane, throughout, was a public highway for carts and carriages, repairable by the defendant council; (2.) that, although the onus of proving that the lane was a highway lay on the plaintiffs, proof of user of such a nature that dedication might be reasonably inferred therefrom was sufficient without proving that during the period of user there was a person capable of dedicating—the onus probandi that there was no such person being on the inhabitants; (3.) that the absence of evidence that the inhabitants had ever repaired the lane, though relevant on the question of whether the lane was or was not a public way, did not rebut the inference based on public user and was not by itself evidence to displace the inhabitants' liability to repair, though, coupled with evidence that some one else was liable, it might have some weight; (4.) that the plaintiff need not give evidence of the inhabitants' liability, before 1835, to repair; (5.) that s. 23 of the Highway Act, 1835, gave the inhabitants a new method of displacing their liability to repair at common law and did not impose on the Crown a new onus of proof, and, therefore, that it was for the inhabitants to prove that a road was one to which the section applied, and not for the Crown to prove that s. 23 did not apply, although, in case of proof that s. 23 applied, the onus of proving that the formalities required by that section to make the inhabitants liable might be shifted; (6.) that the decision of the Court was without prejudice to the right of the defendant council to raise the point whether the portion of Shire Lane in

HIGHWAY—*continued.*

question was a highway unnecessary for public use within the meaning of s. 24 of the Highways and Locomotives (Amendment) Act, 1878. ATTORNEY-GENERAL *v.* WATFORD RURAL DISTRICT COUNCIL - - - **Parker J. 417**

—— Building by-laws—New street—Erection of houses backing on highway—Footpath forming principal access to front of houses - - - - - **369**
See STREET.

—— Gas main — Public highway — Power to break up soil of street and lay pipes—Trespass—Tunnel—"Building"—Mandatory injunction - - - **83**
See GAS.

—— Settled Land Acts — Incumbrance — Liability to repair highway ratione tenuræ.
See SETTLED LAND. 2. **784**

HOTCHPOT CLAUSE—Settled fund—Covenant to settle after-acquired property—Trusts by reference - - - - **794**
See SETTLEMENT.

IMPROVEMENTS—Compensation for—Agricultural holdings — Landlord's written consent—Liability - - - **479**
See VENDOR AND PURCHASER. 1.

INCOME—Capital or—Damages recovered by trustees—Repairing covenants—Breach—Dilapidations - - - - **770**
See WILL. 15.

—— Will — Trust for conversion with power to postpone—Leasehold sub-let at a loss
See WILL. 16. **519**

INCOME TAX—Inland Revenue.
See under REVENUE.

INDEMNITY—Implied liability of purchaser to indemnify vendor against mortgage debt—Exclusion of implied indemnity
See MORTGAGE. 1. **231**

INJUNCTION—Gas main — Public highway—Power to break up soil of street and lay pipes—Trespass — Tunnel — Mandatory injunction - - - - - **83**
See GAS.

—— Royal Arms—Unauthorized user - **10**
See ROYAL ARMS.

—— Schoolmistress, Dismissal of - - **816**
See SCHOOLS.

—— Solicitor—Acting against former client—Confidential information - - **831**
See SOLICITOR. 1.

INLAND REVENUE.
See under REVENUE.

INSURANCE (GUARANTEE) — *Guarantee of Debenture Issue—Re-insurance of Risk—Liquidation of Guarantor Company—Scheme of Arrangement—Alteration of Risk—Liability of Re-insuring Company.*

When a company guarantees the payment of the principal and interest on debentures and re-insures a proportion of the risk, the re-insurer is not released from liability for such proportion by reason of the guarantor company having entered into a scheme of arrangement with its creditors or gone into liquidation. In such a case there is no alteration of the risk, the contingency of such arrangement or liquidation being an element in the acceptance of the risk within the contemplation of the parties.

In 1903 the defendant company entered into a treaty of re-insurance with the plaintiff society under which it agreed to accept in re-insurance a certain proportion of the risks which the plaintiff company desired to re-insure arising (inter alia) under debenture guarantees issued or renewed by the plaintiff society. The treaty provided that the defendant company's liability should commence simultaneously with that of the plaintiff society and should follow it in every case, and that all settlements of claims in which the defendant company might be interested, whether by payment or otherwise, should be unconditionally binding on the defendant company. In 1904 the plaintiff society guaranteed an issue of debentures bearing interest at 4½ per cent. made by R. & Co. The debentures were secured by a trust deed which was in the usual form. By it the plaintiff society was appointed trustee for the debenture-holders, and the realization of the security on default of R. & Co. to pay principal and interest on the debentures thereby secured was left in the absolute and uncontrolled discretion of the plaintiff society, and it was thereby specially provided that that discretion was to be exercised not only for the benefit of the debenture-holders, but of the plaintiff society as guarantor of the debentures. The debentures provided that the interest should be payable half-yearly, and the principal on September 30, 1918, or if default was made for three months in payment of interest or an effective resolution was passed for winding up. Each debenture had indorsed on it a guarantee by which the plaintiff society guaranteed the payment (1.) of interest, if R. & Co. made default in payment thereof for thirty days, on demand, and (2.) of principal, if R. & Co. made default in payment thereof, on September 30, 1918, or on the day after the securities for the debenture-holders should have been enforced and completely realized and distributed. The plaintiff society under the treaty of 1903 re-insured two-thirteenths of this risk with the defendant company. On December 13, 1909, the plaintiff society passed an extraordinary resolution to wind up, and on the following day the winding-up was ordered to be continued under the supervision of the Court, and in the liquidation a scheme of arrangement was sanctioned by the Court. The scheme provided (inter alia) that the interest on the debentures should be payable at 3 per cent. only till a fixed date; that the securities should be realized under the direction

INSURANCE (GUARANTEE)—*continued.*

of the Court; and that the debenture-holders should be placed on the same footing as secured creditors of the plaintiff society with the rights of such creditors under the Bankruptcy Acts. On March 6 an order was made to wind up R. & Co. compulsorily; and on April 1 R. & Co. made default in payment of the interest on the debentures. The defendant company disclaimed liability for the risk re-insured on the ground that its character had been radically altered by the liquidation and scheme of arrangement:—

Held, that the risk insured was that of the default of R. & Co. to pay the principal and interest secured by the debentures, and not that arising from a deficiency of the security; that that risk had not been altered by the liquidation of the plaintiff society or the subsequent scheme of arrangement, and therefore the defendant company still remained liable to the plaintiff society as re-insurer for the proportion of the risk undertaken by it. LAW GUARANTEE TRUST AND ACCIDENT SOCIETY *v.* MUNICH RE-INSURANCE COMPANY - - **Warrington J. 138**

INTEREST—Annuity—Arrears—Judgment debt
See ANNUITY. **332**

—— Demonstrative legacy—Time from which interest runs - - - - **219**
See WILL. 4.

INTERLOCUTORY APPLICATION—For order for access to books of company — Auditors, Duties of—Defalcations— **440**
See COMPANY. 2.

INTESTACY—Will—Construction—Implication of survivorship—Partial intestacy **626**
See WILL. 5.

INVESTMENTS—Trustees.
See under TRUSTEE.

—— Unauthorized investments retained—Leasehold sub-let at a loss—Income - **519**
See WILL. 16.

JOINTURE — "Free from all deductions" — Succession duty - - - - **251**
See SETTLED LAND. 1.

JUDGMENT—Declaratory—Valuation of land—Relief against Crown - - **158, 173**
See REVENUE. 4, 5.

JUDGMENT DEBT—Annuity—Arrears—Interest—Administration action - **332**
See ANNUITY.

LACHES—Following assets—Secured creditor—Equitable right—Delay not amounting to laches - - - - - **561**
See ADMINISTRATION. 2.

LAND—Valuation of—Declaratory judgment—Relief against Crown - - **158, 173**
See REVENUE. 4, 5

LANDLORD AND TENANT—*Covenant—Breach of Lessee's Covenant—Right to Sue—Assignee of Reversion—Vesting by Private Act of Parliament*—32 *Hen.* 8, *c.* 34.

In 1844 property was demised by the Freemen and Stallingers of Sunderland to the defendants' predecessors in title for a term of ninety-nine years, and the lease contained covenants by the lessees to keep the premises in repair and deliver them up at the end of the term. By a private Act of Parliament passed in 1853, which recited that the Freemen and Stallingers and other persons had claims on the property, it was provided that the premises should be and the same were thereby absolutely vested in the plaintiffs, free from all claims and incumbrances, but subject to the existing leases thereof. The defendants threatened to commit a breach of the covenants, and the plaintiffs brought this action for an injunction to restrain them from doing so. The defendants amongst other defences contended that the plaintiffs were not grantees or assignees of the reversion within 32 Hen. 8, c. 34, inasmuch as the original lessors had not executed any grant or assignment to them, and that they could not sue on the covenants :—

Held, that the Act of 1853 must be treated as equivalent to a grant by the Freemen and Stallingers of Sunderland, the lessors under the lease of 1844, of the reversion expectant on that lease, and consequently that the plaintiffs came within 32 Hen. 8, c. 34, and could enforce the covenants. SUNDERLAND ORPHAN ASYLUM *v.* RIVER WEAR COMMISSIONERS

Warrington J. 191

2. ——*Lease—Underlease—Rent of Immediate Tenant in arrear—Notice by Superior Landlord to Under-Tenant to pay Rent to him—Service by Registered Post—Personal Service—Sufficiency of—Law of Distress Amendment Act*, 1908 (8 *Edw.* 7, *c.* 53), *s.* 6.

Sect. 6 of the Law of Distress Amendment Act, 1908, provides that in cases where the rent of the immediate tenant of the superior landlord is in arrear it shall be lawful for such superior landlord to serve upon any under-tenant or lodger a notice "by registered post addressed to such under-tenant or lodger upon the premises" stating the amount of such arrears of rent, and requiring all future payments of rent, whether the same has already accrued due or not, by such under-tenant or lodger to be made direct to the superior landlord giving such notice until such arrears shall have been duly paid :—

Held, that the requirement of service of the notice "by registered post" was inserted only to enable the superior landlord to effect service by registered post if he desired to do so, and that, the object of the section being that the notice should come to the notice of the person for whom it was intended, personal service of the notice was sufficient.

Walter v. *Rumbal* (1695) 1 Ld. Raym. 53, followed. JARVIS *v.* HEMMINGS

Warrington J. 462

3. ——*Tenancy "for two years certain and thereafter from year to year"—When determinable.*

A demise "for two years certain and thereafter from year to year until either party" gives a three months' notice to determine the tenancy is not determinable at the end of the two years, but is a tenancy for three years at least, and only determinable by a notice expiring at the end of the third or any subsequent year. *In re* SEARLE. BROOKE *v.* SEARLE – – – – **Neville J. 610**

—— Agricultural holdings—Compensation for improvements — Landlord's written consent—Liability – – – **479**
See VENDOR AND PURCHASER. 1.

LANDS CLAUSES ACTS—*Compulsory Purchase—Notice to Treat—Counter-Notice—Canal—"House or other building or manufactory"—Lands Clauses Consolidation Act*, 1845 (8 *&* 9 *Vict. c.* 18), *s.* 92.

The words "other building" in the collocation "any house or other building or manufactory" in s. 92 of the Lands Clauses Consolidation Act, 1845, mean other building in the nature of a house although in ordinary language it would not be described as a house, and do not include the entire undertaking of the Regent's Canal and Dock Company.

Dictum of Brett L.J. in *Richards* **v.** *Swansea Improvement and Tramways Co.* (1878) 9 Ch. D. 425, 434, followed and applied. REGENT'S CANAL AND DOCK COMPANY *v.* LONDON COUNTY COUNCIL – – **Warrington J. 583**

LEASE—Arbitration clause—Claim for rectification — Question of law — Staying proceedings – – – – **567**
See ARBITRATION.

—— Landlord and tenant.
See under LANDLORD AND TENANT.

—— Mortgage—Lease by mortgagor in possession —Special extension of statutory power —Non-delivery of counterpart—Validity of lease – – – – – **789**
See MORTGAGE. 2.

LEASEHOLDS — Open contract — "Leasehold house" — Underlease — Head lease — Deposit—Repayment – – **601**
See VENDOR AND PURCHASER. 3.

LEGACY—Will—Construction.
See under WILL.

LICENSING ACTS—Compensation for extinction of licence — Tenant for life and remainderman – – – – **45**
See SETTLED ESTATE.

LIGHT—*Ancient Lights—Obstruction—Measure of Damages—Site Value.*

The plaintiff was the owner of two houses fronting a street, and the windows facing the street were ancient lights. He was also the owner of a piece of land immediately at the rear of and adjoining the houses. The defendant erected a large building on the opposite side of the street and obstructed the plaintiff's ancient lights. In an action for damages for obstructing

LIGHT—*continued.*

the plaintiff's ancient lights it appeared that the houses were old and dilapidated and would soon have to be demolished, that the neighbourhood was no longer residential, but adapted for factories and workshops, that the site of the houses with the piece of land would together form a building site suitable for a warehouse or factory, and that the value of this building site would be diminished by the obstruction to light in the front:—

Held, that the damages the plaintiff was entitled to recover were not limited to the depreciation in value of the houses, but extended to the diminution in value of the whole of his premises considered as one building site.

GRIFFITH *v.* RICHARD CLAY & SONS, LIMITED – – – – **Neville J. 291**

LIMITATION, STATUTES OF—Statute-barred debt — Executors — Acknowledgment —Affidavit for probate – – **196**
See ADMINISTRATION. 1.

—— Trespass by tipping against wall—Adjoining owners of land — Boundary — Adverse possession – – – – – **527**
See TRESPASS.

LOCAL GOVERNMENT—Street.
See under STREET.

LONDON—Water.
See under WATER.

LUNACY—*Practice—Lunatics—Two Sisters of Unsound Mind not so found—Summons as to Property—Separate Summonses—Duplicate Evidence—Consolidation—Costs—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 116—*Rules in Lunacy*, 1892—1893, *rr.* 42, 48, 55.

Two sisters alleged to be persons of unsound mind not so found by inquisition were detained in an asylum. Each was entitled to a one-third share in a small property; one of them had also a mortgage of 392*l.*, and the other a mortgage of 58*l.* Their sister applied for an order that she should be appointed receiver of their estates and that she might be at liberty to apply their income to their maintenance. For this purpose she took out two summonses in similar terms founded on evidence which had been previously filed. This evidence consisted of affidavits practically in duplicate by the applicant stating the family history and property of the lunatics; duplicate copies of an affidavit of the fitness of the applicant to be receiver; and affidavits by the medical attendant, which differed considerably. Separate undertakings by the applicant to account were also filed. The Master objected to the duplicate evidence and made one order appointing the applicant receiver on both summonses; allowing the whole income to be applied for maintenance; and directing that only such costs should be allowed as would have been incurred if one set of affidavits and one undertaking had been filed in the two matters.

The receiver appealed and asked that separate orders might be made:—

LUNACY—*continued.*

Held, that the Master's order was right. It was necessary to have two summonses in the first instance, but not to have duplicate evidence.
In re MORRIS – – – – **C. A. 730**

LUNACY RULES, 1892—1893, rr. 42, 48, 55
See LUNACY. **730**

MANDATORY INJUNCTION.
See under INJUNCTION.

MEETINGS — Company — Statutory meeting — Notice — Shares — Allotment as fully paid – – – – – – **700**
See COMPANY. 6.

METROPOLIS.
See under LONDON.

METROPOLITAN WATER BOARD (CHARGES) ACT, 1907 – – – – – **296**
See WATER. 1.

MERGER—Mortgage—Priority— Reconveyance and new mortgage without notice of intermediate charge — Constructive notice – – – – – **735**
See MORTGAGE. 3.

"**MONEY**"—Bequest of "money" at Post Office Savings Bank—Consols purchased with money on deposit — Whether Consols passed under bequest – – – **388**
See WILL. 1.

MONEY-LENDER — *Registration — Security taken by Unregistered Money-lender—"Course of his business" — Private Investment — Money-lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *s.* 2, *sub-s.* 1 (*a*), (*c*)—*Settlement—Power to Trustees to raise Money with Consent of Tenant for Life—Bankruptcy of Tenant for Life—Consent prejudicial to Interest of Trustee in Bankruptcy—Mortgage — Covenant by Trustees "as such trustees but not otherwise"—Personal Liability —Practice — Pleading Money-lenders Act — Rules of the Supreme Court*, 1883, *Order XIX.*

By his marriage settlement R. assigned funds to trustees upon trusts under which he took a protected life interest and the trustees were empowered to pay his debts and for that purpose to raise money upon his request in writing. In November, 1906, he committed an act of bankruptcy on which he was adjudicated a bankrupt in April, 1907. In December, 1906, he signed a request to the trustees to raise 800*l.* for payment of his debts. They borrowed the money from G. and executed a mortgage in which they covenanted "as such trustees but not otherwise" to repay the money with interest at 6 per cent. G. brought this action to enforce his security. Warrington J. held that G. was an unregistered money-lender, but that the mortgage was valid because it was not taken in the course of his business as a money-lender but as a private investment; that R.'s consent was a protected transaction within s. 49 of the Bankruptcy Act,

MONEY-LENDER—*continued.*

1883; and that the trustees, one of whom had not pleaded the Money-lenders Act, were personally liable on their covenant :—

Held (reversing the decision of Warrington J.), that the mortgage was taken by G. in the course of his business as a money-lender and was therefore entirely void inasmuch as he was not registered; that that being so, the debt was gone and G. could not succeed in a claim for money had and received; that G. had not been taken by surprise, and under the circumstances the omission of one of the trustees to plead the Money-lenders Act was immaterial.

Per Buckley, L.J. : The covenant did not bind the trustees personally.

In re ROBINSON'S SETTLEMENT. GANT *v.* HOBBS - - - - - - - **C. A. 717**

MORTGAGE—*Contingent Reversionary Interest—Equity of Redemption — Purchase — Implied Liability of Purchaser to indemnify Vendor against Mortgage Debt — Interest vesting in Possession — Express Indemnity — Inclusion of Implied Indemnity.*

The plaintiff and his two brothers, who were partners in business, had mortgaged their respective contingent reversionary shares under their father's will to the defendant bank to secure an overdraft due from the firm. The plaintiff had further mortgaged his share to M. to secure a debt of his own. Upon the bank pressing for payment the plaintiff and his brothers agreed to sell their respective equities of redemption to the bank. By the deed of assignment the bank released the plaintiff and his brothers from all moneys owing to the bank on the security of their mortgages, but the bank's mortgages were to be kept on foot as a protection, so far as regarded the plaintiff's share, against M.'s mortgage. The deed also provided that upon the realization of the plaintiff's share the bank should first pay themselves, and then, after satisfying M.'s mortgage, should retain the surplus, if any. The bank also covenanted to pay all duties payable in respect of the shares and to indemnify the plaintiff and his brothers against the same. Before his share fell into possession the plaintiff brought an action for a declaration that he was entitled to be exonerated by the bank from all liability in respect of M.'s mortgage.

Eve J. held ([1911] 1 Ch. 669) that the application of the doctrine of *Waring* v. *Ward* (1802) 7 Ves. 332, which, in the absence of express contract to the contrary, throws upon the purchaser of an equity of redemption an implied obligation to indemnify the vendor against the mortgage debt, was, in the case of a mortgage of a contingent reversion, conditional upon the interest vesting in possession. He further held that, having regard to the existence in the deed of an express limited covenant of indemnity, no fuller indemnity could be implied; and on these grounds he dismissed the action :—

Held, on appeal, affirming the decision of Eve J., but without assenting to the first ground of his judgment, that the provisions of the deed

MORTGAGE—*continued.*

were sufficient to negative in this case the application of the doctrine of *Waring* v. *Ward*. MILLS *v.* UNITED COUNTIES BANK, LIMITED **C. A. 231**

2. —— *Lease by Mortgagor in Possession—Special Extension of Statutory Power—Special Proviso for Delivery of Counterpart to Mortgagee—Lease under Extended Power — Non-delivery of Counterpart — Validity of Lease—Conveyancing and Law of Property Act*, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 18, *sub-ss.* 11, 14.

A mortgage deed contained a declaration that the power of leasing conferred by law on a mortgagor should extend to a lease by the mortgagors for any term not exceeding 1000 years "provided that a counterpart of any such lease, duly executed by the lessee, be delivered to the mortgagees their executors administrators and assigns within one calendar month next after the execution thereof" and the consent thereto of the mortgagees should not be required.

Sect. 18 of the Conveyancing Act, 1881, confers certain powers of leasing on a mortgagor in possession.

Sub-s. 11 provides that the mortgagor shall, within one month after making the lease, deliver to the mortgagee a counterpart of the lease duly executed by the lessee; "but the lessee shall not be concerned to see that this provision is complied with."

Sub-s. 14 provides that any further or other powers of leasing reserved or conferred by the mortgage deed shall be exerciseable, as far as may be, as if they were conferred by the Act, and with all the like incidents, effects and consequences, "unless a contrary intention is expressed in the mortgage deed" :—

Held, that no intention to exclude sub-s. 11 was expressed by the mortgage deed, and consequently a lease under the extended power was valid even if no counterpart was delivered to the mortgagees. PUBLIC TRUSTEE *v.* LAWRENCE **Swinfen Eady J. 789**

3. —— *Priority—Merger—Reconveyance and New Mortgage without Notice of Intermediate Charge—Constructive Notice—Yorkshire Registries Act*, 1884 (47 *&* 48 *Vict. c.* 54)—*Yorkshire Registries Amendment Act*, 1885 (48 *&* 49 *Vict. c.* 26).

In 1900 O. mortgaged land in Yorkshire to A. to secure 300*l.* and interest, and in 1901 he gave a second mortgage upon the same property to the plaintiff. In 1905 he further charged the property to A. All these securities were registered in the Yorkshire Registry. In 1907 O., without disclosing the plaintiff's mortgage, offered to sell his equity of redemption to the defendant W. for 450*l.* She accepted conditionally upon finding some one to advance 300*l.* to pay off A.'s first mortgage. The defendant W. instructed her solicitor, who introduced the defendant F., who agreed to advance the 300*l.* on first mortgage. In carrying out the transaction W.'s solicitor acted for all parties. He did not investigate the title nor search the register None of the parties except O. knew of

MORTGAGE—*continued.*

the existence of the plaintiff's second mortgage. F. advanced the 300*l.*, which the solicitor paid to A., from whom he obtained the title deeds. W. then paid off A.'s further charge, and the whole transaction was completed by three contemporaneous deeds: (1.) a reconveyance by A. to O. freed from A.'s mortgage and further charge; (2.) a conveyance by O. to W.; and (3.) a mortgage by W. to F.:—

Held by Cozens-Hardy M.R. and Buckley L.J. (Fletcher Moulton L.J. dissenting), that on the reconveyance by A. to O., A.'s mortgage and further charge were not kept alive, and the plaintiff's mortgage became a first charge on the droperty in priority to those of the defendants F. and W.

Toulmin v. *Steere* (1817) 3 Mer. 210, followed.

The subject of merger of charges considered.

Per Fletcher Moulton L.J.: *Toulmin* v. *Steere* was wrongly decided and ought to be overruled. At any rate the present case did not come within that decision.

Decision of Parker J. [1911] 2 Ch. 448, reversed. MANKS *v.* WHITELEY – **C. A. 735**

4. —— *Redemption—Tender by Mortgagor—Disappearance of Trustee-Mortgagee—Stoppage of Interest—Costs of obtaining Vesting Order.*

A tender by a mortgagor to a mortgagee of mortgage moneys due need not, in order to prevent further interest running, necessarily be such a tender as would afford a defence to an action at law.

Manning v. *Burges* (1663) 1 Ch. Cas. 29, followed.

But where the tender is made conditional on the execution of a reconveyance, a reasonable time must be allowed to obtain the execution of the deed, especially when the conveying parties are not the persons to whom the tender is to be made.

Wiltshire v. *Smith* (1744) 3 Atk. 89, followed.

As a general rule, the costs of reconveyance fall on the mortgagor, and the costs of obtaining a vesting order of land where the legal estate is in an absconding trustee-mortgagee are no exception to the general rule.

Rourke v. *Robinson* [1911] 1 Ch. 480, and *Schoole* v. *Sall* (1803) 1 Sch. & Lef. 176, distinguished. WEBB *v.* CROSSE – **Parker J. 323**

—— Trustees—Covenant by trustees "as such trustees but not otherwise"—Personal liability — Pleading Money-lenders Act – – – – – **717**
See MONEY-LENDER.

—— Trustees—Investment—Breach of trust—Insufficient security — "Two-thirds" limit – – – – – **261**
See TRUSTEE. 1.

MOTOR CABS — Trade mark — Registration—Initial letters — "W & G"—User of mark – – – – – **644**
See TRADE MARK. 2.

NAME—Misdescription—Gift to non-existing person—Latent ambiguity – – **435**
See WILL. 9.

——, Trade name.
See under TRADE NAME.

NOTICE—Company—Statutory meeting—Shares—Allotment as fully paid – – **700**
See COMPANY. 6.

—— Constructive notice—Terms of tenancy—Claim by tenant after completion—Compensation for improvement – **479**
See VENDOR AND PURCHASER. 1.

—— Mortgage—Priority—Merger — Reconveyance and new mortgage without notice of intermediate charge — Constructive notice – – – – – **735**
See MORTGAGE. 3.

NURSES—Charity—Will—"The Ormond Home for Nurses"—Testatrix herself the home – – – – – **106**
See CHARITY. 2.

ORIGINATING SUMMONS — Costs—Attorney-General—Construction of will—Charitable Trusts Act, 1853 – – **779**
See COSTS.

PARTNERSHIP—*Business Premises the Property of one Partner—No Special Provision as to Tenancy—All Rent to be paid out of Profits—Tenancy implied—Tenancy during Continuance of Partnership.*

Where the premises upon which a partnership business is carried on are, and are declared by the partnership deed to be, the property of one partner, and the partnership deed contains no provision as to the tenancy of the partnership, but only a general direction that all rent is to be paid out of profits, the Court will infer that the partnership was intended to hold the premises on a tenancy during the continuance of the partnership and not on a tenancy from year to year or at will. POCOCK *v.* CARTER
Neville J. 663

PATENT—*Revocation—Manufacture outside the United Kingdom—"Sufficient Reasons"—Threat of Infringement Action—Voluntary or Compulsory Licence—Patents and Designs Act*, 1907 (*7 Edw. 7, c. 29*), *ss.* 24, 27.

The appellants, an American corporation, in 1908 became the assignees of a patent in the United Kingdom, issued in 1904, which they made various unsuccessful efforts to exploit in the United Kingdom. The E. Company were the owners of a patent known as Daley's patent issued in 1899, and, according to a decision of an American Court in 1908 upon two corresponding American patents, the appellants' patent could not be worked without an infringement of Daley's patent. After the decision of the American Court the E. Company wrote a letter to the appellants which in the opinion of the Court amounted to a threat of an action for infringement in case the appellants should work

PATENT—*continued.*

their patent in the United Kingdom, in consequence of which the appellants suspended further efforts to exploit the patent. In 1910 the managing director of the E. Company applied under s. 27 of the Patents and Designs Act, 1907, for the revocation of the appellants' patent on the ground that the patented article was manufactured exclusively or mainly outside the United Kingdom. The Comptroller-General revoked the patent, considering that the threat of an action for infringement did not constitute a "satisfactory reason" for the non-manufacture of the patented article in the United Kingdom within s. 27, sub-s. 2, it being the duty of the appellants to have made every effort to come to an agreement with the E. Company, or, in default of agreement, to have applied under s. 24 for a compulsory licence :—

Held, on appeal, without laying down any general rule, that under the circumstances of this case, having regard to the threat of an infringement action, the appellants had shewn "satisfactory reasons" within s. 27, sub-s. 2, and that no order for revocation ought to be made. *In re* TAYLOR'S PATENT - - **Parker J. 635**

PERPETUITIES—Rule against—Will—Charity—Real estate—Absolute gift with common law condition subsequent—Void—Gift over—Void for uncertainty - **337**
See WILL. 2.

—— Will—Legal limitations - - - **343**
See WILL. 10.

PLEDGE—Executor—Right to pledge personal chattels—Payment of debts—Notice of executorship to pledgee - - **451**
See EXECUTOR.

POSSESSORY TITLE—Vendor and purchaser—Title forced on purchaser - - **2**
See VENDOR AND PURCHASER. 2.

PRIORITY — Company — Winding-up — Surplus assets—Distribution—Various issues—No priority as to capital - - **72**
See COMPANY. 8.

—— Mortgage — Merger — Reconveyance and new mortgage without notice of intermediate charge—Constructive notice.
See MORTGAGE. 3. **735**

PROBATE—Administration.
See under ADMINISTRATION.

PROSPECTUS — Company — Inadmissibility of prospectus to explain meaning of debenture — Provision void for repugnancy - - - - - - **1**
See COMPANY. 3.

PUBLIC HEALTH—Street—New street—Building by-laws - - - - **369**
See STREET.

PUBLIC TRUSTEE.
See under TRUSTEE.

PURCHASER—Vendor and.
See under VENDOR AND PURCHASER.

RAILWAY—*Running Powers over another Line—General Traffic—Junction by Third Company for Limited Traffic—Amalgamation of Running Company with Junction Railway — Effect of Amalgamation — Railways Clauses Act*, 1863 (26 & 27 *Vict. c.* 92), *ss.* 38, 39, 41, 55.

Under a special Act of 1865 the Great Central Railway Company obtained general running powers over the Midland Railway Company's line from M. to W. In 1897 the Derbyshire Railway Company, whose line crossed the Midland Company's said line at S., constructed under the powers of another special Act a short line (called the S. curve) and a junction connecting their line with the Midland line at S., and, under an agreement with the Midland Company, acquired limited running powers over so much of the Midland line as lay between the junction and a colliery on the Midland line for coal traffic to and from the colliery by way of the S. curve and junction.

In 1906 the Great Central Company and the Derbyshire Company were amalgamated under a special Act which incorporated the Railways Clauses Consolidation Act, 1845, and the amalgamation provisions of the Railways Clauses Act, 1863, and the Derbyshire Company was dissolved. The Great Central Company then claimed that, as owners of the Derbyshire Company's undertaking, they were entitled to bring general traffic over the S. curve and junction and then, by virtue of their general running powers under the Act of 1865, to pass such traffic over the Midland line to and from M. :—

Held by the Court of Appeal, reversing the decision of Neville J. [1911] 2 Ch. 173, that the effect of the amalgamation was to give to the Great Central Company no greater rights over the Midland line than were possessed and enjoyed by the Derbyshire Company before the amalgamation ; and that after the amalgamation the Great Central Company was entitled to enjoy the statutory powers of user given by s. 92 of the Railways Clauses Consolidation Act, 1845, only to the same extent and subject to the same conditions as the Derbyshire Company had enjoyed them.

Midland Ry. Co. v. *Great Western Ry. Co.* (1873) L. R. 8 Ch. 841, distinguished. GREAT CENTRAL RAILWAY COMPANY *v.* MIDLAND RAILWAY COMPANY - - - **C. A. 206**

RATES—Water rate.
See under WATER.

REAL PROPERTY LIMITATION ACTS.
See under LIMITATIONS, STATUTE OF.

RECEIVER—Company—Receiver and manager — Duties — Repudiation of company's contracts - - - - - **468**
See COMPANY. 4.

REDEMPTION—Mortgage.
See under MORTGAGE.

REGISTRATION—Money-lenders.
See under MONEY-LENDER.

—— Trade mark.
See under TRADE MARK.

RELEASE — Debt — Cancellation — Will — Construction — Deduction of debts from settled legacies—Advances by testator
See DEBT. **498**

REMOTENESS—Limitations after estate tail—Legal and beneficial interests—Period of ascertainment - - - **510**
See WILL. 11.

—— Vesting—Gift to children at twenty-three
See **WILL. 17.** **693**

RENTS — Will — Construction — Receipt and application of rents—Surplus rents **343**
See WILL. 10.

REPUGNANCY—Will—Condition—Partial forfeiture—Costs—Action based on wilful default — Condition inapplicable or repugnant - - - - **399**
See WILL. 3.

REVENUE—*Estate Duty—Settled Fund—Successive Lfie Estates—General Power to Settlor's Wife to appoint definite Sum out of Fund—Remainder of Fund in trust for Settlor's Residuary Legatees — Incidence of Duty—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 6, *sub-s.* 2; *s.* 8, *sub-ss.* 3, 4; *s.* 9; *s.* 14, *sub-s.* 1.

A trust fund was settled in 1897 upon trust to pay the income thereof to the settlor for life and after his death to his wife for life and after the death of the survivor upon trust as to 10,000*l.*, part of the fund, for such persons as the wife should by will appoint, and the remainder of the fund was to fall into the settlor's residuary estate disposed of by his will.

On the settlor's death in 1908 estate duty was paid on the fund. The wife died in 1911, having appointed the 10,000*l.* by her will:—

Held, that the estate duty paid on the settlor's death must be borne rateably by the wife's appointees and the settlor's residuary legatees.

Berry v. *Gaukroger* [1903] 2 Ch. 116, applied.

Note on *Berry* v. *Gaukroger*, see [1912] 1 Ch. 322, n. *In re* CHARLESWORTH'S TRUSTS. TEW *v.* BRIGGS - - - - **Joyce J. 319**

2. —— *Estate Duty—Settlement Estate Duty — Testatrix domiciled in England — Personal Property situate Abroad—Separate Executors of Foreign Property—Liability of English Executors—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, *sub-s.* 2; *ss.* 5, 6, *sub-s.* 2; *s.* 8, *sub-s.* 3; *s.* 9, *sub-s.* 4—*Finance Act*, 1896 (59 & 60 *Vict. c.* 28), *s.* 19.

The English executors of a testatrix domiciled in England are to the extent of the assets in their hands liable to pay English estate duty and settlement estate duty on foreign personalty, although this foreign personalty is expressly bequeathed to foreign executors and remains under their sole control. *In re* CONSUELO, DOWAGER DUCHESS OF MANCHESTER. VISCOUNT DUNCANNON *v.* DUKE OF MANCHESTER **Swinfen Eady J. 540**

3. —— *Income Tax — Super-tax — Returns before Imposition of the Tax — Customs and Inland Revenue Act*, 1890 (53 & 54 *Vict. c.* 8), *s.* 30—*Finance* (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 66, 72.

The super-tax on incomes over 5000*l.* a year, first imposed by s. 66 of the Finance (1909–10) Act, 1910, and then only for the financial year beginning April 6, 1909, is additional income tax, and one of the "duties of income tax" within the meaning of those words in s. 30 of the Customs and Inland Revenue Act, 1890, and, therefore, in order to ensure the collection in due time of super-tax granted for any financial year commencing on April 6, statutory provisions relating to income tax in force on the preceding day have effect with respect to the tax so granted as if the tax had been actually imposed by Act of Parliament and the statutory provisions had been applied thereto by that Act.

Returns with a view to assessing super-tax may, therefore, be required although no Act of the financial year imposing the tax has been passed, if, as is usual, there was an Act as to collection in force on April 5.

Quære, whether, before the Act imposing the tax has been passed, the revenue authority can assess and demand payment of it.

Super-tax was imposed for the financial year beginning April 6, 1910, by the Finance Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 35), s. 3, which provided that enactments relating to super-tax in force with respect to the tax granted for the year beginning April 6, 1909, should have effect with respect to the tax granted by the Finance Act, 1910. The Revenue Act, 1911 (1 & 2 Geo. 5, c. 2), passed in March, 1911, contained provisions with respect to super-tax, but did not impose the tax for the financial year beginning April 6, 1911. Before any Act imposing super-tax for that year had been passed the revenue authorities demanded from the plaintiff returns of his income under s. 72, sub-s. 2, of the Finance (1909–10) Act, 1910, for the purpose of assessing the tax:—

Held, that the demand was lawful.

Sect. 72, sub-s. 3, of the Finance (1909–10) Act, 1910, shews that the Act was not intended to regulate the collection of super-tax for the financial year 1909 only, but also its collection for subsequent financial years. BOWLES *v.* ATTORNEY-GENERAL - - **Parker J. 123**

4. —— *Valuation of Land—Form 4—Owner who is also Occupier—Return to be made to Appointed Officer—Less than Statutory Limit of Time for making Return allowed—Requisition that Owner who is also Occupier should state Annual Value—Ultra vires—Relief against Crown—Declaratory Judgment—Rules of the Supreme Court*, 1883, *Order XXV., r.* 5; *Order LXVIII., r.* 1—*Finance* (1909–1910) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 26.

On August 9, 1910, the plaintiff, who was the owner of land in Yorkshire, received a notice,

REVENUE—*continued.*

dated August 4, signed by the secretary to the Commissioners of Inland Revenue, requiring him to make returns of his property upon forms which accompanied the notice and deliver them "within thirty days from this date to the appointed officer H. B." The notice also pointed out that failure to make a return within the specified time would entail a penalty not exceeding 50*l.* With the notice were sent six copies of Form 4, issued under the Finance (1909–1910) Act, 1910, five of which related to premises belonging to the plaintiff and let to tenants, and one to property owned and occupied by him. The forms asked for "Particulars required by the Commissioners which must be furnished so far as it is in the power of the person making the return to give them . . . . (*i*) If the person making the return is also the occupier state the annual value; that is the sum for which the property is worth to be let to a yearly tenant, the owner keeping it in repair":—

Held, affirming the decision of Horridge J., that the direction to make the return to H. B. instead of to the Commissioners did not invalidate the notice; that requisition (*i*) was unauthorized and, therefore, that the whole of the Form 4 addressed to the plaintiff as owner and occupier was invalid; that inasmuch as the statutory period of thirty days provided by s. 26, sub-s. 2, of the Finance (1909–1910) Act, 1910, as the period within which to make his return, had not been allowed to the plaintiff, he was under no obligation to comply with the requisitions in any of the forms; and (following their Lordships' previous decision in *Dyson* v. *Attorney-General* [1911] 1 K. B. 410) that the Court had jurisdiction to make a declaratory order against the Attorney-General as representing the Crown.
DYSON *v.* ATTORNEY-GENERAL – **C. A. 158**

5. —— *Valuation of Land—Form 8—Requisitions as to Payment or Receipt of Rent without specifying Land—Requisition as to Description and Situation of Lands—Ultra vires—Return to be made to Appointed Officer—Full Statutory Time for making Return not given—Declaratory Judgment — Relief against Crown — Finance* (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 26, 31.

For the purposes of the valuation of all land in the United Kingdom prescribed by s. 26 of the Finance (1909–10) Act, 1910, s. 31, sub-s. 1, of that Act provides that "Every person who pays rent in respect of any land, and every person who as agent for another person receives any rent in respect of any land, shall, on being required by the Commissioners, furnish to them within thirty days the name and address of the person to whom he pays rent or on behalf of whom he receives rent, as the case may be"; and s. 31, sub-s. 3, provides that "if any person wilfully fails to comply with the provisions of this section, he shall be liable to a penalty not exceeding fifty pounds to be recoverable in the High Court":—

Held (affirming the decision of Warrington J. [1911] 2 Ch. 139), that the form—known as "Form 8—Land"—which the Commissioners had issued in purported exercise of the powers

REVENUE—*continued.*

conferred by s. 31 of the Act, and which was sent by their appointed officer to the plaintiff, a rent collector, was wholly unauthorized inasmuch as it did not specify the particular parcels of land in respect of which the names and addresses were to be furnished, and also inasmuch as it required the plaintiff to give the descriptions and precise situations of the lands in respect of which rent was paid or received.

Held, further (reversing the decision of Warrington J., [1911] 2 Ch. 139, on this point), that it was not ultra vires on the part of the Commissioners to direct the return to be sent to their appointed officer instead of to themselves.

The form in question and the notice dated August 25, 1910, upon which it was indorsed, and which required the plaintiff to furnish the information "within thirty days from this date" to the appointed officer and referred to the penalty for wilful failure to furnish the information, were sent through the post by the appointed officer to the plaintiff and not received by him until August 26, 1910.

The effect of the want of a full thirty days' notice discussed by Cozens-Hardy M.R. and Fletcher Moulton L.J., and held by Farwell L.J. to be a fatal objection entitling the plaintiff to disregard the notice.

Note.—The questions relating to the form of action and the jurisdiction to make a declaratory order against the Attorney-General as representing the Crown are dealt with in the judgments in *Dyson* v. *Attorney-General* [1912] 1 Ch. 158.
BURGHES *v.* ATTORNEY-GENERAL – **C.A. 173**

—— Estate duty—Heirlooms—Succession duty—Interest – – – – – **251**
See SETTLED LAND. 1.

REVERSION — Covenant — Breach of lessee's covenant—Right to sue—Assignee of reversion—Vesting by private Act of Parliament – – – – **191**
See LANDLORD AND TENANT: 1.

REVOCATION—Patent.
See under PATENT.

ROAD.
See under HIGHWAY.

ROYAL ARMS—*Unauthorized User—Injunction—User in connection with Business—User unaccompanied by Words "By appointment"—"Calculated to lead to the belief"—Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *s.* 68—*Evidence—Question as to Effect produced on Mind of Witness by Display of Royal Arms—Admissibility—Form of Order.*

By s. 68 of the Trade Marks Act, 1905, "If any person, without the authority of His Majesty, uses in connexion with any trade, business, calling, or profession, the Royal Arms . . . . in such manner as to be calculated to lead to the belief that he is duly authorised so to use the Royal Arms . . . . he may . . . . be restrained by injunction . . . . from continuing so to use the same . . . .":—

ROYAL ARMS—*continued.*

Held, that the "belief" contemplated by the section was the belief on the part of the members of the public who see the display of the Royal Arms, and not merely that of present or prospective customers of the person wrongfully displaying them, the object of the section being to prevent the spreading of a belief among the public which might lead to an increase of prestige, and consequent business to the person wrongfully using the Royal Arms.

The defendants carried on business as engineers, manufacturers, and contractors. On the front of their premises above the shop front was fixed a cast-iron representation of the Royal Arms, containing the shield with the supporters, crest, and mottoes. The Arms had been in that position for at least thirty-five years and before the defendants took a lease of the premises. No such words as "By appointment" were used in connection with the Arms. The defendants had no authority to use the Royal Arms.

In an action by properly constituted plaintiffs under s. 68 of the Trade Marks Act, 1905, for an injunction to restrain the unauthorized user by the defendants of the Royal Arms:—

Held, that the defendants were using the Royal Arms in connection with their trade or business and in such manner as to be calculated to lead to the belief that they were duly authorized so to use them.

Held, therefore, that the plaintiffs were entitled to an injunction restraining the user by the defendants of the Royal Arms in connection with their trade or business "on their premises or otherwise."

The question put to a witness in examination, "What was the conclusion in your mind arising from the fact that defendants exhibited the Royal Arms on their business premises?" was held admissible by analogy to the question permitted in passing-off cases, "Did you believe that the defendant's goods were the plaintiff's?"

Observations of Farwell J. in *Bourne* v. *Swan & Edgar, Ld.* [1903] 1 Ch. 211, 224, applied.

ROYAL WARRANT HOLDERS' ASSOCIATION *v.* EDWARD DEANE & BEAL, LIMITED
Warrington J. 10

RULES OF THE SUPREME COURT, 1883:—

Order XIX. (Pleading generally)– 717
See MONEY-LENDER.

Order XXV. (Proceedings in lieu of Demurrer), r. 5 – – – – 158
See REVENUE. 4.

Order LV. (Chambers in the Chancery Division), r. 3 – – – – 779
See COSTS.

—— **rr. 62. 93** – – – – 332
See ANNUITY.

Order LXVIII. (Application of Rules in Crown. Revenue, and Matrimonial Cases), r. 1 – – – – 158
See REVENUE. 4.

SCHOOLMISTRESS—Dismissal of—Contract of service — Notice of determination — Power of managers—Consent of local education authority – – – **816**
See SCHOOLS.

SCHOOLS — *Education — Public Elementary School — Non-provided School — Dismissal of Schoolmistress—Contract of Service—Notice of Determination—Powers of Managers—Consent of Local Education Authority—Dismissal "on grounds connected with the giving of religious instruction in the school"—Religious Belief of Teacher—Injunction—Education Act*, 1902 (2 *Edw.* 7, *c.* 42), *s.* 7, *sub-ss.* 1, 5, 6, 7.

In 1906, after the passing of the Education Act, 1902, the plaintiff entered into an agreement with the then managers of the H. non-provided public elementary school, which was a Church of England school, for her employment as a teacher. On October 28, 1911, the defendants, the present managers of the school, gave the plaintiff a month's notice to determine her agreement, alleging as their reason that they were not satisfied with the religious instruction given by her in the school. Until that notice was given no complaint with regard to the religious instruction given by the plaintiff had ever been made. The consent of the local education authority had not been obtained by the defendants to the dismissal of the plaintiff. On November 30, 1911, the notice expired and the plaintiff left.

The plaintiff brought the present action for an injunction to restrain the defendants from acting on the notice of October 28, 1911, and for a declaration that she was still entitled to exercise the duties of the office of teacher, and moved for an interim order.

At the hearing of the motion it appeared from the evidence of the defendants that their real ground for dismissing the plaintiff was that in their opinion she had ceased to be a member of the Church of England. This the plaintiff denied:—

Held, that under s. 7 of the Education Act, 1902, the position of the plaintiff was not merely that of a servant who had entered into a contract of employment with a master, a term of which was that she should not be dismissed except upon his compliance with certain conditions, but that she had a statutory right to the position which she had acquired under the Act unless and until the requirements of the Act with regard to her dismissal had been complied with.

Held, also, that the ground of dismissal appearing by the evidence was not a ground "connected with the giving of religious instruction in the school" within the meaning of s. 7, sub-s. 1 (*c*), and therefore that the consent of the local education authority to the plaintiff's dismissal was necessary.

Held, therefore, that the plaintiff was entitled to the injunction and declaration she asked.

In order to render a dismissal without the consent of the local education authority a valid dismissal under s. 7, sub-s. 1 (*c*), of the Act it is necessary not merely that the managers should in their own minds consider that a ground for

SCHOOLS—*continued.*

dismissal connected with the giving of religious instruction exists, but that the ground should in fact exist. SMITH *v.* MACNALLY
Warrington J. 816

—— Conveyance of site under the Schools Sites Act, 1841—Charity—Cy-près **667**
See CHARITY. 1.

SERVICE—Landlord and tenant—Service by registered post — Personal service — Sufficiency of - - - - **462**
See LANDLORD AND TENANT. 2.

SERVICE (CONTRACT OF).
See under CONTRACT OF SERVICE.

SET-OFF—Company—Winding-up — Calls **405**
See COMPANY. 7.

SETTLED ESTATE—*Tenant for Life and Remainderman—Freehold Licensed Premises—Compensation for Extinction of Licence—"Persons interested in the licensed premises"—Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 2.

Where licensed premises form part of a settled estate, and the licence is extinguished under the provisions of the Licensing Act, 1904, the proportion of the compensation allocated to the freeholder of the premises represents capital money of the estate.

Decision of Neville J. [1911] 2 Ch. 350, affirmed.

Semble, the question could not properly be raised upon originating summons. *In re* BLADON. DANDO *v.* PORTER - - **C. A. 45**

SETTLED FUND—Trustees—Unauthorized investment — Capital and income — Trustee also tenant for life - - **67**
See TRUSTEE. 3.

SETTLED LAND — *Heirlooms—Estate Duty—Succession Duty—Interest—Tenant for Life—Remainderman—Liability to pay Interest—Capital Moneys derived from Land applied in Discharge of Incumbrances on Heirlooms—Jointure—"Free from all deductions"—Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 32, 42, 44—*Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 9, *sub-s.* 5—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 21 ; *s.* 37, *sub-s.* 2.

In 1889 estates were settled in strict settlement and heirlooms were settled upon trusts to correspond as nearly as might be to the uses of the freeholds. Under that settlement the seventh Earl of Egmont became tenant for life and the eighth became tenant for life in remainder. The seventh Earl died in 1897. Under a power contained in the settlement the eighth Earl granted to his wife a jointure "free from all deductions." He died in 1910. Estate duty and succession duty on the heirlooms were not paid in 1897, and the Crown now claimed the duties and interest thereon. The trustees had in their hands investments representing capital moneys and rents accrued during the lives of the eighth and the present Earl :—

Held, that the settlement must be treated as one settlement of the estates and of the heirlooms ; that the interest must be paid out of the income of the estate accrued during the lives of the tenants for life ; that capital moneys raised from other parts of the settled property might be applied in discharging incumbrances on the heirlooms ; and that according to the true construction of the settlement and grant the succession duty on the jointure must be paid out of the capital moneys. *In re* EARL OF EGMONT'S SETTLED ESTATES. LEFROY *v.* EGMONT
Warrington J. 251

SETTLED LAND—*continued.*

2. —— *Incumbrance — Liability to repair Highway ratione tenuræ — Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 21, *sub-s.* (ii.).

A liability of the owners and occupiers of a settled estate to repair a highway ratione tenuræ is not an incumbrance which the trustees have power to discharge or redeem out of capital moneys in their hands under s. 21, sub-s. (ii.), of the Settled Land Act, 1882. *In re* HODGSON'S SETTLED ESTATE. ALTAMONT *v.* FORSYTH
Neville J. 784

—— Capital or income—Damages recovered by trustees—Repairing covenants—Breach —Dilapidations - - - - **770**
See WILL. 15.

—— Estate duty.
See under REVENUE.

—— Will—Trust for conversion with power to postpone — Tenant for life and remainderman — Unauthorized investments retained - - - - **519**
See WILL. 16.

SETTLEMENT—*Hotchpot Clause—Settled Fund—Covenant to settle After-acquired Property—Trusts by Reference—Construction of Settlement.*

By a marriage settlement made in 1877, after reciting that by virtue of a prior settlement and deed poll the wife was entitled to a reversionary sum of 15,000*l.*, but subject to a provision in the deed poll for the reduction thereof in case the wife should make default in bringing the same into account in the division of certain trust funds in the deed poll mentioned, the said sum of 15,000*l.* was settled, subject to the life interests of the husband and wife, in trust for children of the marriage as the husband and wife should jointly appoint, and in default as the survivor should appoint, and in default in trust for children of the marriage in equal shares, the sons to take vested interests at twenty-one and the daughters at twenty-one or marriage. Then followed a usual hotchpot clause relating to "the said trust premises," and usual powers of maintenance and advancement with the usual ultimate trusts in default of children in favour of the wife. The settlement contained an agreement to settle the wife's other or after-acquired property upon trusts for sale and conversion, the proceeds to be held "upon the trusts and with and subject to the powers, provisoes, agreements and declarations herein declared concerning the said sum of 15,000*l.* hereinbefore expressed to be hereby assigned," and further provided that, notwithstanding the said agreement, if the wife became

SETTLEMENT—*continued.*

entitled to any interest which ought to be settled pursuant to the said agreement but under the provisions of the said deed poll would go in satisfaction of the 15,000*l.*, it should be lawful for the trustees to release any such interest with the intent of keeping the 15,000*l.* intact and unreduced. The husband and wife appointed the 15,000*l.* in favour of one daughter and died without having made any further appointment:—

Held, that for the purposes of the hotchpot clause the 15,000*l.* and the other or after-acquired property were distinct funds, and that the daughter was entitled to share in the other or after-acquired property without bringing the 15,000*l.* appointed to her into hotchpot.

In re Marquis of Bristol [1897] 1 Ch. 946, followed.

In re Perkins (1892) 67 L. T. 743; 41 W. R. 170, distinguished. *In re* CAVENDISH. GROSVENOR *v.* BUTLER – – – **Parker J. 794**

SETTLEMENT ESTATE DUTY.
See under REVENUE.

SEVERANCE—Legacy—Gift of capital and accumulations of income at twenty-six—Previous trusts—Vested or contingent
See WILL. 6. **489**

SHARES—Company.
See under COMPANY.

—— Will—Legacy—Specific bequest of shares—Reconstruction of company—Whether specific bequest adeemed – – **828**
See WILL. 7.

SOLICITOR—*Acting against former Client—Injunction—Confidential Information—Members of same Firm—Discharge of Solicitor—Firm Name.*

M. and C. were the only partners in a firm of solicitors named E. M. & C. and were in the habit of doing business separately and without any knowledge of each other's clients. R. consulted M. with reference to an action for wrongful dismissal which he desired to commence against a company. He then changed his solicitors and issued his writ, and the matter was referred to arbitration, the proceedings in which were still in progress. C. was away at the time and knew nothing of the consultations between R. & M., and whilst the arbitration was going on he was appointed under the name of E. M. & C. to act as solicitor for the company in the arbitration. R. applied for an injunction to restrain E. M. & C. from acting for the company:—

Held, that there was no general rule that a solicitor who had acted for some person either before or after the litigation began could in no case act for the opposite side; the Court must be satisfied in each case that mischief would result from his so acting; that there could be no danger of any breach of confidence if C. acted for the company; and (reversing the decision of Warrington J.) that the injunction must be refused.

Decision of Hall V.-C. in *Little* v. *Kingswood*

SOLICITOR—*continued.*

Collieries Co. (1882) 20 Ch. D. 733; 47 L. T. 323, overruled. RAKUSEN *v.* ELLIS, MUNDAY & CLARKE – – – – – **C. A. 831**

2. —— *Costs—Charging Order — Property recovered or preserved—Proceeding—Sale—Payment to Client—Discretion—Solicitors Act*, 1860 (23 *&* 24 *Vict. c.* 127), *s.* 28.

In a creditor's administration action the usual decree was made on July 1, 1907. In January, 1910, the plaintiff entered into a contract for the sale of the only outstanding asset for 383*l.* The defendant, the surviving executrix, opposed the confirmation of this contract on the ground of undervalue, and the property was ordered to be sold by auction. At this sale, of which the defendant had the conduct, considerable expenses were incurred, and the property fetched 400*l.*, which was paid into Court. In January, 1911, on further consideration, an order was made that a sum of 64*l.* found due from the defendant to the estate should be set off against her costs, and that the residue of her costs and those of the plaintiff should be paid out of the 400*l.* The solicitors who had acted for the defendant throughout the proceedings applied for a charging order for the whole of their costs on the fund in Court as being property recovered or preserved in the proceedings within the meaning of s. 28 of the Solicitors Act, 1860:—

Held, affirming the decision of Neville J. [1911] 2 Ch. 318, that the order was in the discretion of the Court, and the Court would not make it in this case, because the order on further consideration practically ordered the same costs as those for which the solicitors now asked for a charge to be paid to their client. *In re* COCKRELL'S ESTATE – – – **C. A. 23**

3. —— *Costs—Taxation—Disbursements inserted in Bill by Error—One-sixth Rule—Special Certificate—Court's Discretion as to Costs of Taxation—Solicitors Act*, 1843 (6 *&* 7 *Vict. c.* 73), *s.* 37.

Where the effect of a taxation of a bill of costs under s. 37 of the Solicitors Act, 1843, is to reduce the bill by a sixth part or more of the total amount, and the taxing Master certifies specially any circumstances relating to the bill or taxation, the discretion of the Court to make an order as to the costs of the taxation not in accordance with the one-sixth rule may be exercised in favour of either the solicitor or the client.

In his bill of costs as delivered a solicitor entered in the disbursements column certain counsel's fees. These fees had been paid by cheques of the client, but the cheques had been returned by counsel to the solicitor, who had sent them back to the client. In one instance there was a note in the bill that the cheque had been returned by counsel, but in no case was the client credited with the amount in the bill, although in a cash account delivered with the bill the amounts were all credited to the client. The result of the taxation was that a little more than one-sixth of the total amount of the bill was taxed off, and the taxing officer taxed the costs of the reference payable to the client,

SOLICITOR—*continued.*

but specially certified the circumstances and stated that if he had been at liberty to strike out the counsel's fees the effect would have been that less than one-sixth would have been taxed off. The insertion of the fees was by a blunder of the solicitor or his clerk. The solicitor applied, on the special circumstances certified, that the taxing Master should be directed to tax the costs of the taxation payable to the solicitor instead of to the client, and that the certificate should be varied accordingly :—

Held, that the costs of the taxation must be borne by the client, but that the solicitor must pay the costs of the client of the application to the Court, as between solicitor and client. *In re* RICHARDS - - - - **Parker J. 49**

SPECIFIC BEQUEST—Shares—Reconstruction of company—Whether specific bequest adeemed - - - - - **828**
See WILL. 7.

SPECIFIC LEGACY.
See under WILL.

SPECIFIC PERFORMANCE — Agreement for sale — Contract in correspondence—Stipulation for formal contract—Construction - - - - - **284**
See VENDOR AND PURCHASER. 4.

STAFFORDSHIRE AND WORCESTERSHIRE CANAL ACT, 1766 - - - **61**
See FISHERY.

STREET—Gas main—Public highway—Power to break up soil of street and lay pipes —Trespass—Mandatory injunction **83**
See GAS.

STATUTES :—

1540.

32 Hen. 8, c. 34—*Covenants* - - - **191**
See LANDLORD AND TENANT. 1.

1623.

21 Jac. 1, c. 16, s. 3—*Limitation* - - **196**
See ADMINISTRATION. 1.

1766.

6 Geo. 3, c. xcvii., s. 74 — *Staffordshire and Worcestershire Canal*- - - **91**
See FISHERY.

1833.

3 & 4 Will. 4, c. 27, ss. 2, 3—*Real Property Limitation* - - - - **527**
See TRESPASS.

1835.

5 & 6 Will. 4, c. 50, s. 23—*Highway* - - **417**
See HIGHWAY.

1837.

1 Vict. c. 26, s. 24—*Wills* - - - **29**
See WILL. 13.

—— —— s. 33 - - - - - **392**
See WILL. 14.

STATUTES—*continued.*

1841.

4 & 5 Vict. c. 38—*Schools Sites* - - **667**
See CHARITY. 1.

1843.

6 & 7 Vict. c. 73, s. 37—*Solicitors* - - **49**
See SOLICITOR. 3.

1845.

8 & 9 Vict. c. 18, s. 92—*Lands Clauses Consolidation* - - - - - - **583**
See LANDS CLAUSES ACTS.

1847.

10 & 11 Vict. c. 15, ss. 6, 7, 10—*Gasworks Clauses*
See GAS. **83**

10 & 11 Vict. c. 17, s. 53—*Waterworks Clauses*
See WATER. 2. **846**

1853.

16 & 17 Vict. c. 51, ss. 32, 42, 44—*Succession Duty* - - - - - **251**
See SETTLED LAND. 1.

16 & 17 Vict. c. 137, s. 20—*Charitable Trusts*
See COSTS. **779**

1860.

23 & 24 Vict. c. 127, s. 28—*Solicitors* - **23**
See SOLICITOR. 2.

1862.

25 & 26 Vict. c. xxx., ss. 68, 73—*Bristol Waterworks* - - - - - **846**
See WATER. 2.

1863.

26 & 27 Vict. c. 92, ss. 38, 39, 41, 55—*Railways Clauses* - - - - - **206**
See RAILWAY.

1869.

32 & 33 Vict. c. 67, ss. 43—47—*Valuation (Metropolis)* - - - - - **296**
See WATER. 1.

1874.

37 & 38 Vict. c. 57, s. 1—*Real Property Limitation* - - - - - - **527**
See TRESPASS.

1875.

38 & 39 Vict. c. 55, ss. 4, 157—*Public Health*
See STREET. **369**

1881.

44 & 45 Vict. c. 41, s. 3, sub-s. 3 ; s. 14—*Conveyancing and Law of Property* - **601**
See VENDOR AND PURCHASER. 3.

—— —— s. 18, sub-ss. 11, 14 - - - **789**
See MORTGAGE.

STATUTES—*continued.*

1882.

45 & 46 Vict. c. 38, s. 21, sub-s. (ii.)—*Settled Land* – – – – – **784**
See SETTLED LAND. 2.

—— —— s. 21; s. 37, sub-s. 2 – – **251**
See SETTLED LAND. 1.

—— —— s. 53 – – – **770**
See WILL. 15.

1884.

47 & 48 Vict. c. 54—*Yorkshire Registries* – **735**
See MORTGAGE. 3.

1885.

48 & 49 Vict. c. 26—*Yorkshire Registries Amendment* – – – – – – **735**
See MORTGAGE. 3.

1889.

52 & 53 Vict. c. 49, s. 4—*Arbitration* – **566**
See ARBITRATION.

1890.

53 & 54 Vict. c. 5, s. 116—*Lunacy* – – **730**
See LUNACY.

53 & 54 Vict. c. 8, s. 30—*Customs and Inland Revenue* – – – – – **123**
See REVENUE. 3.

1893.

56 & 57 Vict. c. 53, s. 8, sub-s. 1—*Trustees* **261**
See TRUSTEE. 1.

1894.

57 & 58 Vict. c. 30, ss. 1, 2, sub-s. 2; ss. 5, 6, sub-s. 2; s. 8, sub-s. 3; s. 9, sub-s. 4—*Finance* – – – – – **540**
See REVENUE. 2.

—— —— s. 6, sub-s. 2; s. 8, sub-ss. 3, 4; s. 9; s. 14, sub-s. 1 – – – – **319**
See REVENUE. 1.

—— —— s. 9, sub-s. 5 – – – – **251**
See SETTLED LAND. 1.

1896.

59 & 60 Vict. c. 28, s. 19—*Finance* – – **540**
See REVENUE. 2.

1900.

63 & 64 Vict. c. 51, s. 2, sub-s. 1 (*a*), (*c*)—*Money-lenders* – – – **717**
See MONEY-LENDER.

63 & 64 Vict. c. 62—*Colonial Stock* – – **55**
See TRUSTEE. 2.

1902.

2 Edw. 7, c. 42, s. 7, sub-ss. 1, 5, 6, 7—*Education* **816**
See SCHOOLS.

1904.

4 Edw. 7, c. 23, s. 2—*Licensing* – – **45**
See SETTLED ESTATE.

STATUTES—*continued.*

1905.

5 Edw. 7, c. 15, s. 3; s. 9, sub-s. 5—*Trade Marks* – – – – – **644**
See TRADE MARK. 2.

—— —— ss. 11, 12, 59 – – – – **40**
See TRADE MARK. 1.

—— —— s. 68 – – – – – **10**
See ROYAL ARMS.

1906.

6 Edw. 7, c. 55, s. 5, sub-s. 4—*Public Trustee* **806**
See TRUSTEE. 4.

1907.

7 Edw. 7, c. 29, ss. 24, 27—*Patents and Designs* – – – – – **635**
See PATENT.

—— —— ss. 49, 60, 93 – – – – **613**
See COPYRIGHT.

7 Edw. 7, c. lxxxix., ss. 5, 7—*Worthing Gas* **83**
See GAS.

7 Edw. 7, c. clxxi., ss. 8, 13—*Metropolitan Water Board (Charges)* – – – **296**
See WATER. 1.

1908.

8 Edw. 7, c. 28, ss. 1, 2, and Sched. I., Part I.—*Agricultural Holdings* – – **479**
See VENDOR AND PURCHASER. 1.

8 Edw. 7, c. 53, s. 6—*Law of Distress Amendment* – – – – – **462**
See LANDLORD AND TENANT. 2.

8 Edw. 7, c. 69, s. 65—*Companies (Consolidation)* – – – – – **700**
See COMPANY. 6.

—— —— s. 112, sub-ss. 1, 6; s. 113, sub-ss. 1, 2 – – – – – **440**
See COMPANY. 2.

—— —— s. 223 – – – – – **410**
See COMPANY. 5.

1909.

9 Edw. 7, c. 49, s. 16—*Assurance Companies* **35**
See COMPANY. 1.

1910.

10 Edw. 7, c. 8, s. 26—*Finance* (1909–1910) **158**
See REVENUE. 4.

—— —— ss. 26, 31 – – – – **173**
See REVENUE. 5.

—— —— ss. 66, 72 – – – – **123**
See REVENUE. 3.

STAYING PROCEEDINGS — Lease — Construction—Claim for rectification—Question of law—Arbitration clause – – **566**
See ARBITRATION.

STREET — *New Street — Building By-laws — Erection of Houses backing on Highway—Footpath forming Principal Access to Front of Houses—Abandonment of Footpath before Action —Access to Back of Houses from Highway through Openings in Hedge—Width and Construction of Streets—Local Government—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 157.

The building by-laws of an urban sanitary authority required that every person who should lay out a new street over 100 feet long should so lay it out that its width should be 36 feet at the least, and that it should be constructed for use as a carriage-road.

The defendant was the owner of certain land which abutted on the east on H. Road and was separated therefrom by an ancient hedge. The road was from eighteen to twenty feet wide and ran north and south. On this land the defendant erected a row of ten houses having their backs to H. Road. Between the backs of the houses and the hedge he left a strip of land about sixteen feet wide. On the west side of the houses the defendant constructed a footpath about 130 feet long which ran along the front of the houses and communicated on the north with H. Road. On the east side of the houses the defendant inserted gates in the hedge giving access to the houses across the strip from H. Road, and drained the houses into a sewer which he had constructed in that road. The action was brought for breach of the by-laws relating to the new streets both as regards H. Road and the footpath. Prior to the issue of the writ the defendant removed the footpath and gave notice of his intention to abandon it :—

Held, that the construction of the footpath would have been an undoubted breach of the by-laws, but that, inasmuch as the defendant had abandoned it before the commencement of the action and was not threatening and intending to make it, there was no ground for granting an injunction.

Held, also, that the by-laws contemplated something in the nature of a physical as distinguished from a mere metaphorical laying out of a new street; that the defendant had done nothing to the road or its boundaries beyond making the communications between it and his houses and draining his houses into the road; and that he had not therefore laid out H. Road as a new street within the meaning of the by-laws.

Observations of Romer L.J. in *Devonport Corporation* v. *Tozer* [1903] 1 Ch. 759, 764, applied. ATTORNEY-GENERAL *v.* DORIN
Warrington J. 369

SUBSTITUTIONARY GIFT—Will following the words of the Wills Act, 1837 – **392**
See WILL. 14.

SUCCESSION DUTY :
See under REVENUE.

SUMMONS—Lunatics—Summons as to property — Separate summonses — Duplicate evidence—Consolidation—Costs – **730**
See LUNACY.

SUMMONS—*continued.*

—— Originating summons—Costs — Attorney-General—Construction of will—Practice —Charitable Trusts Act, 1853 – **779**
See COSTS.

SURPLUS ASSETS—Company—Winding-up.
See under COMPANY.

SURVIVOR — Will — Construction—Implication of survivorship—Partial intestacy **626**
See WILL. 5.

TAXATION—Solicitors' costs.
See under SOLICITOR.

TAXES—Inland Revenue.
See under REVENUE.

TENANCY—Partnership—No special provision as to tenancy — Tenancy implied — Tenancy during continuance of partnership – – – – – **663**
See PARTNERSHIP.

TENANT—Landlord and :
See under LANDLORD AND TENANT.

TENANT FOR LIFE.
See under SETTLED ESTATE ; SETTLED FUND ; SETTLED LAND.

TENDER—Mortgagor, Tender by—Disappearance of trustee-mortgagee—Stoppage of interest – – – – – **323**
See MORTGAGE. 4.

THREAT — Patent — Revocation — Threat of infringement action – – – **635**
See PATENT.

TITLE—Vendor and purchaser :
See under VENDOR AND PURCHASER.

TOWING PATH—Fishing from—Canal—Trespass—Deed—General words—Construction – – – – – – **91**
See FISHERY.

TRADE MARK—*Matter calculated to deceive—Use of Foreign Words—Registration allowed subject to Undertaking—Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 11, 12, 59.

The use of a Spanish brand name as part of a trade mark in connection with cigars may be, but is not necessarily, "calculated to deceive" within the meaning of s. 11 of the Trade Marks Act, 1905, as containing the false suggestion that the cigars are made in Havana or some Spanish-speaking country, when in fact they are made elsewhere. Each case must be judged by its own special circumstances.

In re McGlennon's Application (1908) 25 Rep. Pat. Cas. 797, distinguished. *In re* VAN DER LEEUW'S TRADE MARK – – **Parker J. 40**

2. —— *Registration — Distinctive Mark — Initial Letters—"W & G"—Motor Cabs—User of Mark—Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *s.* 3 ; *s.* 9, *sub-s.* 5.

Motor cab proprietors in London applied for registration as trade marks of two marks used

TRADE MARK—*continued.*

by them for about three years on and in connection with their motor cabs in London. One mark consisted of the two letters "W" and "G" (joined by the symbol denoting "and") written in a running hand with a thickening of the component parts of each letter and a distorted tail to the "G" ending up under the "W." The other mark consisted of "W & G" in ordinary block letters.

The registrar refused the application, and on appeal to Eve J. his decision was affirmed.

On appeal to the Court of Appeal:—

Held by Cozens-Hardy M.R. and Farwell L.J., that in respect of the former mark (*dubitante* Farwell L.J.), but not the latter one, the applicants should be allowed to proceed towards the second stage towards registration, when, after advertisements had been issued and opponents heard, the registrar would be in a better position to decide whether registration should be permitted.

Per Fletcher Moulton L.J.: The applicants should be allowed to proceed in respect of both the marks.

The decision of Eve J. varied. *In re* APPLICATIONS OF W. & G. DU CROS, LIMITED **C. A. 644**

—— Royal Arms—Unauthorized user—Injunction - - - - - - **10**
See ROYAL ARMS.

TRADE NAME—*Company—Similarity of Name—Deception—Right of Individual to trade in his own Name—Transfer of Use of Name to Company.*

Although a person not bound by any contractual restriction can on leaving the employment of a limited company carry on a rival business in his own name notwithstanding that the use of it is calculated to cause confusion between his own business and that of his former employers, and although, having so carried on business and acquired a goodwill of his own, he can (it may be) transfer to a new company as incidental to that goodwill the right to use his name as a part of their registered name, he is not entitled immediately on leaving his employment to transfer the right to make such use of his name to a new company formed for the purpose of carrying on a rival business where such use is calculated to cause confusion, and it makes no difference that his name carries with it the reputation of personal qualifications which he places at the disposal of the new company.

Fine Cotton Spinners and Doublers Association v. *Harwood Cash & Co.* [1907] 2 Ch. 184, followed and applied. KINGSTON, MILLER & CO. *v.* THOMAS KINGSTON & CO.
Warrington J. 575

TRESPASS—*Wall—Trespass by Tipping against Wall—Adjoining Owners of Land—Boundary—Erection of Wall within Boundary Line—Abandonment—Discontinuance of Possession—Adverse Possession—Statute of Limitations—Real Property Limitation Acts,* 1833 *and* 1874 (3 & 4 *Will.* 4, *c.* 27, *ss.* 2, 3; 37 & 38 *Vict. c.* 57), *s.* 1).

The plaintiffs and defendant were adjoining owners of land physically divided by a dry ditch or channel of an ancient watercourse. In 1894 the plaintiffs built on their own side of the ditch an enclosing wall. In an action between the parties at that date it was judicially determined that the true boundary was the middle line of the ditch. The erection of the wall left unenclosed a narrow strip of land belonging to the plaintiffs, the real boundary, though known to both parties, remaining unmarked.

In 1910 the plaintiffs brought an action to restrain the defendant from trespassing on the strip by tipping earth and rubbish upon it and against the wall; the defendant contended that by the erection of the wall the plaintiffs had abandoned the strip and that the defendant had acquired exclusive possession and retained it for more than the period required to establish a possessory title under the Statute of Limitations. The only evidence of such possession by the defendant was that cattle belonging to his tenants had been allowed to graze such herbage as grew in the ditch and on the strip between it and the wall:—

Held, that there had been no abandonment or discontinuance of possession by the plaintiffs and that they were entitled to judgment.

Decision of Joyce J. affirmed. KYNOCH, LIMITED *v.* ROWLANDS - - - **C. A. 527**

—— Fishing from towing path—Canal—Deed—General words—Construction - **91**
See FISHERY.

—— Gas main—Power to break up soil of street and lay pipes—Tunnel—"Building"
See GAS. **83**

TRUSTEE—*Investment—Mortgage—Breach of Trust—Insufficient Security—Property let on Weekly Tenancies—Duty of Trustees to inquire as to Nature of Property and Financial Position of Mortgagor—Valuer, Employment of—Duty of Trustee to inquire as to previous Dealings with Mortgagor—Duties of Valuer—Remuneration—"Two-thirds" Limit—Form of Report—Trustee Act,* 1893 (56 & 57 *Vict. c.* 53), *s.* 8, *sub-s.* 1.

By the Trustee Act, 1893, trustees lending trust moneys on the security of property on which they can lawfully lend are relieved from the burden formerly cast upon them by the Court of investigating for themselves the nature and circumstances connected with the security and the financial position of the borrower, and are justified in assuming that the surveyor or valuer employed by them under sub-s. 1 of s. 8 of the Act of 1893 to report as to the value of the property and to advise them as to lending money on it will ascertain for himself all the facts necessary to enable him to make a proper report.

Trustees who by their trust are authorized to lend trust moneys on the security of leasehold property are entitled to lend it on the security of leasehold cottage property let on weekly tenancies, but the amount which they may safely

TRUSTEE—*continued.*

lend on such property must depend upon the circumstances of each particular case.

The words "instructed and employed independently of any owner of the property" in sub-s. 1 of s. 8 mean that the relation of employer and employee must exist between the trustees and the surveyor or valuer and between them alone. The surveyor or valuer must be entitled to look for payment of his remuneration to the trustees alone, and must be responsible to them alone for the due performance of his duty. He must be instructed and employed by the trustees in the particular matter independently of the mortgagor, but it is not incumbent on the trustees before employing him to inquire into his previous business transactions with a view of ascertaining whether at any time near or remote he has acted for or advised the mortgagor.

It is the duty of surveyors and valuers in advising trustees as to lending trust moneys to state in their report not only what they consider to be the actual value of the property offered as security, but also what proportion of that value the trustees may safely advance upon the security quite irrespective of any supposed rule as to the two-thirds limit, subject only to this, that if they are so satisfied as to the importance of the security as to advise them to advance more than two-thirds of the value, the trustees would not be justified in acting on that advice inasmuch as if they did so they would exceed the limit prescribed by sub-s. 1 of s. 8.

Where a surveyor or valuer is employed by trustees to value and report upon property it is not essential for him, in order to comply with sub-s. 1 of s. 8, in so many words to state in his report that he advises the trustees to advance a specified sum of money; it is sufficient if he states what he considers to be the value of the property, and that it forms a sufficient security for the sum named by him. *In re* SOLOMON. NORE *v.* MEYER – – **Warrington J. 261**

2. —— *Investment — Stock or Securities of any "British Colony or Dependency" — Stock of Provinces of Canada—Meanings of "Colony" and "Dependency"—Colonial Stock Act*, 1900 (63 *&* 64 *Vict. c.* 62).

Trustees cannot, under a power to invest in stocks or securities of any "British colony or dependency," invest in the stocks of any province of the Dominion of Canada, unless that province has complied with the requirements of the Colonial Stock Act, 1900—at any rate if the stock was issued after the province was merged in the Dominion of Canada.

Per Cozens-Hardy M.R.: The investment might be made in the stock of a province—such as Ontario, Quebec, Nova Scotia, or British Columbia—which was a colony before it was merged in the Dominion of Canada, if the stock was issued before the colony was so merged.

A part of a colony, or a part of a dependency, is not itself a colony or dependency. "Dependency" is a wider term than "colony," but its exact meaning has not yet been judicially determined. Canada, however, is a colony or dependency.

Per Cozens-Hardy M.R. and Farwell L.J.:

TRUSTEE—*continued.*

Clauses in trust instruments enlarging the power of investment beyond what the general law sanctions ought to be construed strictly.

Observations as to interpreting trust instruments by the light of statutory definitions. *In re* SIR S. M. MARYON-WILSON'S ESTATE – **C. A. 55**

3. —— *Investment (Unauthorized)—Liability —Settled Fund—Capital and Income—Claim of Remainderman for Excess of Income received by Tenant for Life beyond Amount obtainable from authorized Investments—Trustee also Tenant for Life.*

Where a trustee has invested a settled fund in unauthorized investments and the tenant for life has thereby received a larger income, but the capital is intact, the persons entitled in remainder cannot claim to recover from the tenant for life the excess of income which has been paid to him. And this rule applies to a case where the same person is trustee and tenant for life and has herself retained the excess of income. *In re* HOYLES. ROW *v.* JAGG (No. 2) **Swinfen Eady J. 67**

4. —— *Public Trustee — Appointment of — Expediency—Ground of Expense—Order to prohibit—Trust and Trustee—Public Trustee Act*, 1906 (6 *Edw.* 7, *c.* 55), *s.* 5, *sub-s.* 4.

Where a sole trustee, desiring to retire, proposed to exercise his statutory power by appointing the Public Trustee in his place, the estate being of the value of upwards of 38,000*l.* (part being building land), and all but one of the tenants for life and some of the remaindermen (a class likely to be largely increased) being in favour of the appointment, the Court refused to make an order, under s. 5, sub-s. 4, of the Public Trustee Act, 1906, prohibiting the appointment.

Whether it is open to a beneficiary applying for an order under the sub-section to base his application solely on the ground of the expense which the appointment would involve, *quære.*

But, assuming that it is, the fact of that expense, provided that it is not exceptional or disproportionate, cannot in ordinary cases be treated as a material element in determining whether it is "expedient" or not to make the order. *In re* FIRTH. FIRTH *v.* LOVERIDGE **Eve J. 806**

—— Liability—Mortgage—Covenant by trustees "as such trustees but not otherwise"—Personal liability — Pleading Moneylenders Act – – – – **717**
See MONEY-LENDER.

—— Trustee-mortgagee — Disappearance of — Tender by mortgagor — Stoppage of interest — Costs of obtaining vesting order – – – – – **323**
See MORTGAGE. 4.

TUNNEL—Gas main—Power to break up soil of street and lay pipes — Trespass — "Building" — Mandatory injunction – – – – – – **83**
See GAS.

ULTRA VIRES—Valuation of land—Declaratory judgment—Relief against Crown – **158**, *See* REVENUE. 4, 5. **173**

UNDERLEASE—Notice by superior landlord to under-tenant to pay rent to him — Service by registered post — Personal service—Sufficiency of – – **462**
See LANDLORD AND TENANT. 2.

—— Open contract — "Leasehold house" — Head lease — Payment of deposit — Repayment – – – – **601**
See VENDOR AND PURCHASER. 3.

USER—Royal Arms.
See under ROYAL ARMS.

—— Trade mark.
See under TRADE MARK.

VALUATION—Land — Relief against Crown — Declaratory judgment – **158, 173**
See REVENUE. 4, 5.

VALUATION (METROPOLIS) ACT, 1869 – **296**
See WATER. I.

VALUERS—Duties of—Remuneration — "Two-thirds" limit — Form of report — Trustees—Investment—Mortgage **261**
See TRUSTEE. 1.

VENDOR AND PURCHASER — *Agricultural Land — Sale subject to Tenancy — Condition of Sale—Inspection of Lease or Agreement previous to Sale—Terms of Tenancy—Constructive Notice — Claim by Tenant after Completion—Compensation for Improvement — Landlord's written Consent—Liability—Agricultural Holdings Act*, 1908 (8 *Edw.* 7, *c.* 28), *ss.* 1 *and* 2 *and Sched. I., Part I.*

A consent in writing given under the terms of a lease (and *semble*, a similar consent under the Agricultural Holdings Act, 1908) by a landlord to a tenant making improvements during his tenancy, for which improvements, being made with such consent, he becomes entitled to compensation, is a term of the tenancy within a condition of sale affecting purchasers with notice of the terms of all existing tenancies; and if any claim for compensation for such improvements arises after the date fixed for completion of the sale, it must be borne by the purchaser. *In re* EARL OF DERBY AND FERGUSSON'S CONTRACT – – – – – **Joyce J. 479**

2. —— *Contract—Title—Title to commence with Devise in* 1842*—Abstract from* 1842 *shewing Ouster of true Owner in* 1874*—Subsequent Possessory Title—Title forced on Purchaser.*

A contract for sale of land in 1911 provided that the title should commence with a general devise in the will of a testator who died in 1842 and whose seisin was to be assumed.

The vendor in fact derived title from a disseisor who in 1874, under a mutual mistake as to the effect of the will, ousted the true owner, who was under no disability, and obtained possession of the property and the title deeds.

The disseisor and those claiming under her had been in possession for the thirty-seven years since 1874. The mistake was not realized at the date of the contract, so that the fact that the title was partly possessory was not mentioned therein:—

Held, that the vendor had shewn a good title and that it could be forced on the purchaser.

Scott v. *Nixon* (1843) 3 D. & War. 388, and *Games* v. *Bonnor* (1884) 33 W. R. 64; 54 L. J. (Ch.) 517, applied. *In re* ATKINSON AND HORSELL'S CONTRACT – **Swinfen Eady J. 2**

3. —— *Open Contract—"Leasehold house"—Underlease—Property agreed to be sold forming Part only of Property comprised in Head Lease—Payment of Deposit—Repayment—Conveyancing and Law of Property Act*, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 3, *sub-s.* 3; *s.* 14.

A purchaser entered into an open contract to purchase a "leasehold" house and paid a deposit. It appeared on the face of the abstract of title that the property agreed to be sold was held upon an underlease and formed part of larger premises comprised in two head leases. The purchaser objected to the title on the ground that the property being so held she would be liable to eviction by the original lessor for breaches of covenant in respect of property not comprised in the underlease:—

Held, that a good title had not been shewn by the vendors to the property agreed to be sold, and that the purchaser was entitled to a return of the deposit.

Doctrine established in *Darlington* v. *Hamilton* (1854) Kay, 550, 558, and followed in *Creswell* v. *Davidson* (1887) 56 L. T. 811, applied. *In re* LLOYDS BANK LIMITED AND LILLINGTON'S CONTRACT – **Warrington J. 601**

4. —— *Specific Performance — Agreement for Sale—Contract in Correspondence—Stipulation for Formal Contract—Construction.*

An alleged contract for the sale of a leasehold house, contained in letters wherein it was stipulated by the purchaser that her acceptance was subject to, amongst others, a condition that her solicitors should "approve the title to and covenants contained in the lease, the title from the freeholder and the form of contract":—

Held, on the construction of the documents, not to be a complete contract susceptible of being enforced by way of specific performance.

North v. *Percival* [1898] 2 Ch. 128, doubted. VON HATZFELDT-WILDENBURG *v.* ALEXANDER **Parker J. 284**

VESTED — Contingent or — Severance — Gift of capital and accumulations of income at twenty-six—Previous trusts – **489**
See WILL. 6.

VESTING — Shares to children — Gift over to survivors—"In case of the death"—Divesting – – – – – **245**
See WILL. 12.

—— Will—Construction—Gift to children at twenty-three—Remoteness – – **693**
See WILL. 17.

VESTING ORDER — Mortgagor, Tender by — Disappearance of trustee-mortgagee—Stoppage of interest—Costs of obtaining vesting order – – – – **323**
See MORTGAGE. 4.

WALL — Trespass by tipping against wall — Adjoining owners—Boundary – **527**
See TRESPASS.

WATER — *Rate — Provisional Valuation List during Quarter for which Rate payable in advance—Metropolitan Water Board (Charges) Act*, 1907 (7 *Edw.* 7, *c. clxxi.*), *ss.* 8, 13—*Valuation (Metropolis) Act*, 1869 (32 *&* 33 *Vict. c.* 67), *ss.* 43—47.

The defendant was the occupier of premises called the "Brown Bear," in Aldersgate Street, London, E.C. These premises were, during the quarter from October 1 to December 31, 1910, and the preceding and succeeding quarters, supplied with water by the plaintiffs.

In 1908 the valuation list for the parish of the city of London was altered by the making of a supplemental valuation list, in which the rateable value of the "Brown Bear" was shewn at 400*l.* This supplemental list came into force on April 6, 1909. On June 2, 1910, the overseers of the parish sent to the assessment committee, pursuant to s. 47 of the Valuation (Metropolis) Act, 1869, a provisional list, in which the "Brown Bear" was included at the reduced rateable value of 399*l.*, and on June 23, 1910, the committee's clerk served on the defendant, as occupier, a copy of so much of the provisional list as related to the "Brown Bear," with a notice specifying a day on or before which any objection to the list might be made. On October 3, 1910, the committee considered the provisional list and reduced the rateable value to 234*l.*, thereafter returning the list and a copy, after being dated on that day and signed by their clerk, to the overseers in accordance with s. 47 of the Act of 1869.

By s. 8 of the Metropolitan Water Board (Charges) Act, 1907, payment for water so supplied is to be at a rate per annum not exceeding 5 per centum of the "rateable value" of the house or building in respect of which the supply is required. By s. 13 of the Charges Act, "the rateable value . . . . for the purposes of this Act shall be determined by the valuation list in force at the commencement of the quarter for which the water rate accrues." The water rate is payable in advance, and by s. 15 the quarterly days for its payment are April 1, July 1, October 1, and January 1 in each year :—

Held, on the construction of the Charges Act and the Valuation (Metropolis) Act, 1869, that the "valuation list in force" (referred to in s. 13 of the former Act) on October 1, 1910, was the supplemental list made in 1908, unaltered by the provisional list ; and that the defendant was liable to pay the rate payable on that date assessed on the rateable value of 400*l.*

The alteration in an existing valuation list, by the provisional list referred to in s. 47 of the Valuation (Metropolis) Act, 1869, is not made and does not come into force until the assessment committee have disposed of the objections to the list, as brought in by the overseers, and the list has been signed as required by that section. METROPOLITAN WATER BOARD *v.* PHILLIPS – – – – **Parker J. 296**

WATER—*continued.*

2. —— *Workhouse—Water Company—Supply of Water for Domestic Purposes — "Private dwelling house"—Bristol Waterworks Act*, 1862 (25 *&* 26 *Vict. c. xxx.*), *ss.* 68, 73—*Waterworks Clauses Act*, 1847 (10 *&* 11 *Vict. c.* 17), *s.* 53.

A water company by s. 68 of its special Act (which incorporated the Waterworks Clauses Act, 1847) was required at the request of the owner or occupier to furnish to every occupier of a "private dwelling-house" or part of a dwelling-house within the limits of its Act a supply of water for the domestic use of the occupier at water rents based on the rental value of the premises. By s. 53 of the Waterworks Clauses Act, 1847, every owner and occupier of any "dwelling-house" or part of a dwelling-house within the limits of the special Act was, on complying with certain conditions, to be entitled to demand and receive from the undertakers a sufficient supply of water for domestic purposes.

The guardians of the poor of the parish of B. as the owners and occupiers of certain workhouses, offices, and homes for children within the limits of the company's special Act claimed a supply of water for domestic purposes at the rents prescribed by s. 68 of the special Act :—

Held (Fletcher Moulton L.J. dissenting), that the general Act of 1847 must be read subject to the provisions of the special Act, and that the right to demand and the obligation to supply water for domestic purposes to dwelling-houses under s. 53 of the Act of 1847 were limited by s. 68 of the special Act to private dwelling-houses.

Held, also (Fletcher Moulton L.J. expressing no opinion on the point), that a workhouse was not a "private dwelling-house" within the meaning of s. 68 of the special Act.

Held, therefore, that the claim of the guardians failed.

Principles of construction to be applied to private Acts relating to waterworks and to similar undertakings stated by Fletcher Moulton L.J.

Decision of Eve J., [1912] 1 Ch. 111, affirmed. BRISTOL GUARDIANS *v.* BRISTOL WATERWORKS COMPANY – – **C. A. 846**

WILL — *Bequest of "Money" at Post Office Savings Bank—Consols purchased with Money on deposit — Whether Consols passed under Bequest—Will—Construction.*

A testatrix, after directing certain pecuniary legacies to be paid out of "any money" standing to her credit at the Post Office Savings Bank, bequeathed "the residue of such moneys" to A. The will contained a general residuary bequest. The testatrix at her death had cash standing to the credit of her deposit account at the Post Office and also a sum of Consols purchased by her through the Post Office with cash withdrawn from her deposit account, the price of the

WILL—*continued.*

Consols and the commission being charged as withdrawals in her Post Office deposit book :—

Held, that the Consols did not pass to A. under the above bequest of "money," but fell into the residuary estate.

In re Adkins (1908) 98 L. T. 667, distinguished. *In re* MANN. FORD *v.* WARD

Neville J. 388

2. —— *Charity—Real Estate—Absolute Gift with Common Law Condition Subsequent—Void—Rule against Perpetuities—Gift Over—Void for uncertainty—Will—Construction.*

The testator devised all his real estate at Adelaide, South Australia, to trustees upon trust during the lives of successive tenants for life to apply the income in a particular manner, and on the falling in of the last life tenancy to convey the said real estate to the council of the Church of England Collegiate School of St. Peter, Adelaide. But this disposition was made on the express condition that the council published annually a statement of payments and receipts, and in case of default for six calendar months in the publication of such statement, the disposition in favour of the collegiate school was thenceforth to cease and to go over to and enure for the sole benefit of such person or persons and for such public purposes as the Governor-in-Chief of South Australia should in writing direct :—

Held, that the gift over and the condition were both bad, the former not being a good charitable gift, on the authority of *Blair* v. *Duncan* [1902] A. C. 37, and *Grimond* v. *Grimond* [1905] A. C. 124 ; and the latter being a common law condition subsequent, working a forfeiture on the condition coming into operation, and obnoxious to the rule against perpetuities.

In re Trustees of Hollis' Hospital and Hague's Contract [1899] 2 Ch. 540, followed :—

Held, therefore, that the council of the collegiate school were entitled to a clean conveyance from the trustees of the will, without reference to the condition or gift over. *In re* DA COSTA. CLARKE *v.* CHURCH OF ENGLAND COLLEGIATE SCHOOL OF ST. PETER

Eve J. 337

3. —— *Condition — Partial Forfeiture — Whole Costs of any Administration Action commenced by a Beneficiary to be paid out of his Share — Action based on Wilful Default — Probabilis causa litigandi—Condition inapplicable or repugnant.*

A testator provided that in case any action or other proceedings for the administration of his estate should be commenced by any beneficiary as plaintiff, the costs of all parties should be retained and paid out of the plaintiff's share :—

Held—(*a*) This provision did not apply to an action based on wilful default, this being probabilis causa litigandi.

Powell v. *Morgan* (1688) 2 Vern. 90, and *Adams* v. *Adams* [1892] 1 Ch. 369, 377, applied.

(*b*) The provision if applicable to such an action would have been void for repugnancy.

WILL—*continued.*

Rhodes v. *Muswell Hill Land Co.* (1861) 29 Beav. 560, 563, applied. *In re* WILLIAMS. WILLIAMS *v.* WILLIAMS – **Swinfen Eady J. 399**

4. —— *Demonstrative Legacy—Fund wholly reversionary—No time for Payment fixed by Will—Time from which Interest runs.*

The testator bequeathed to his sister "the sum of 10,000*l.* as her sole and absolute property to be paid out of the estate and effects inherited by me from my mother in terms of her last will and testament and as regards the residue of the aforesaid estate and effects of my said mother so to be inherited by me in terms of her aforesaid will and of all my estate and effects at present in my possession and enjoyment I do hereby appoint as my sole heir or heirs" certain specified persons. The testator died in 1903. All the property to which he was entitled under the will of his mother was in reversion expectant on the life interest of his father, who died in 1910 :—

Held, that the legacy of 10,000*l.* was a demonstrative legacy ; that there was nothing in the will expressly directing payment to be made only when the reversion fell in ; that the mere fact that the fund out of which the legacy was directed to be primarily paid was reversionary made no difference; and that interest on the legacy ran from the expiration of a year from the testator's death.

The rule of law as laid down by Lord Cairns in *Lord* v. *Lord* (1867) L. R. 2 Ch. 782, 789, applied.

The result in *Earle* v. *Bellingham* (No. 2) (1857) 24 Beav. 448, followed as the natural consequence of the admission by counsel in that case that the legacy was not payable until the reversion fell into possession, and is no authority for any general principle (nor is there in fact any such) that where a legacy is payable out of a particular fund, which is wholly reversionary, interest on the legacy does not run until the reversion falls in.

In re Gyles [1907] 1 I. R. 65, dissented from on this point.

Decision of Joyce J. reversed. *In re* WALFORD. KENYON *v.* WALFORD – **C. A. 219**

5.——*Intestacy—Gift of Income to Fourteen named Persons during respective Lives—Substitutional Gift to Children—Gift over of Whole on Death of Survivor of Thirteen only—Death in Testator's Lifetime—Implication of Survivorship—Partial Intestacy—Will—Construction.*

Testator gave the income of his estate, real and personal, to trustees upon trust to pay and divide the same equally between and amongst S., the daughter of C., and thirteen other named persons during their respective lives, and, if any of them should die leaving children them surviving, directed the share of income payable to the parent to be divided equally amongst his, her, or their children, and from and after the death of the survivor of the said thirteen other named persons (the name of S. being omitted) upon trust to sell the whole of his trust estates and divide the proceeds equally amongst such of the children of the said C. and thirteen other named persons (the name of S. being again

WILL—*continued.*

omitted) as might be living at the death of the last survivor of them, or, if any of them were dead leaving children them surviving, then amongst their children, such children to take their parent's share equally between them. Two of the thirteen named persons died in the testator's lifetime without leaving children :—

Held, that there was an intestacy as to these two shares of income down to the period of distribution. *In re* HOBSON. BARWICK *v.* HOLT
Parker J. 626

6. —— *Legacy—Gift of Capital and Accumulations of Income at Twenty-six — Previous Trusts—Vested or contingent—Severance—Will —Construction.*

The testator charged his debts and the estate duty payable in respect of his estate upon the income and profits of certain shares in a company and bequeathed the shares to trustees upon trust out of the income thereof to augment the income of his daughters and to pay his son an annual sum of 3000*l.* until he should attain the age of twenty-six, and, when and so soon as he should attain that age, to hold the shares and the accumulations of income arising therefrom upon trust for his son absolutely. There was no gift over. The son survived the testator and died at the age of twenty-three, a bachelor and intestate :—

Held, on the true construction of the will, that inasmuch as there was no severance of the shares from the rest of the estate the son's interest in the shares was contingent, not vested.

Decision of Neville J. [1911] 2 Ch. 510, reversed. *In re* LORD NUNBURNHOLME. WILSON *v.* NUNBURNHOLME – – **C. A. 489**

7. —— *Legacy—Specific Bequest of Shares —Reconstruction of Company—Shares in New Company substituted for Shares in Old Company —Whether Specific Bequest adeemed.*

A testator by his will gave his ten 4*l.* fully-paid ordinary shares in a company to N. Between the date of the will and of the death of the testator the company went into voluntary liquidation for the purposes of reconstruction, and as so reconstructed was incorporated in the same name. Under the scheme of reconstruction the testator became entitled to two 5*l.* fully-paid preference shares and two 5*l.* fully-paid ordinary shares in the new company for every 4*l.* ordinary share he held in the old company, but in other respects the new company was substantially the same as the old company :—

Held, that there had been no ademption, and that N. was entitled to the substituted shares in the new company. *In re* LEEMING. TURNER *v.* LEEMING – – – – **Neville J. 828**

8. —— *Legacy — Subsequent Gift of Equal Amount—Ademption—Letter of Testator stating that Gift was instead of Legacy—Contents not communicated to Legatee in Testator's Lifetime —Evidence of Intention—Admissibility of Letter.*

Testator by his will, dated in 1908, bequeathed a legacy of 300*l.* to D., his housekeeper and nurse. On April 15, 1909, he wrote a letter addressed to her, enclosing a cheque, in which he

WILL—*continued.*

requested her to tell his executors that the cheque was instead of the 300*l.* left her by his will. The contents of the letter were not communicated to her, but the letter with the cheque were in her presence sealed up in an envelope and placed in a drawer by the testator, who called her attention to the matter and told her to open the envelope on his death. In December, 1910, the testator requested D. to get the envelope, and he opened it in her presence. He took out the cheque and put the letter without the cheque into another envelope, sealed it, and told her to keep it and open it on his death. He subsequently sent the cheque or another for a similar amount to his bankers with instructions to place the money to the credit of a joint account in the names of himself and D., with power to either party to draw, and this was accordingly done. The letter was opened and read by D. for the first time on the testator's death :—

Held, that there was nothing in the transaction to affect the conscience of D. and to preclude her from claiming both the legacy and the gift.

Held, also, that the letter of April 15, 1909, was not admissible in evidence to prove that the testator intended that the gift should be in substitution for the legacy.

Held, therefore, that D. was entitled to both the legacy and the gift.

Dictum of James L.J. in *Fowkes* v. *Pascoe* (1875) L. R. 10 Ch. 343, 350, followed.

Chapman v. *Salt* (1709) 2 Vern. 646 ; *Shudal* v. *Jekyll* (1742) 2 Atk. 516 ; *Hall* v. *Hill* (1841) 1 D. & War. 94 ; and *Kirk* v. *Eddowes* (1844) 3 Hare, 509, considered and explained. *In re* SHIELDS. CORBOULD-ELLIS *v.* DALES
Warrington J. 591

9. —— *Name—Misdescription—Gift to Non-existing Person—Latent Ambiguity—Evidence— Admissibility — Summons by Trustees — Costs— Unsuccessful Litigant — Practice — Will—Construction.*

By his will made in 1891 a testator devised all his freehold property to his wife for life, and after her death "unto and to the use of John William Halston (otherwise Alston), the son of Israel Halston (otherwise Alston)" in fee simple. The testator died in 1899, and his widow, the tenant for life, in 1911. Israel Alston, the testator's brother, had a son called John William Alston, who was born in March, 1874, and whose existence was known to the testator, but who died ten days afterwards, seventeen years before the date of the will. This son's death was well known to the testator. Israel Alston had other sons, of whom one, the defendant John Robert Halston (otherwise Alston), claimed the property. There was evidence that the son who died had received his names at the request of the testator, and that the testator desired that J. R. Halston should bear the name of John. Further, that the testator had told J. R. Halston that the land would be his some day. There was no evidence that the testator knew that the boy had been given the name of John Robert.

Upon a summons by the legal personal representatives of the testator to decide who was entitled, the defendant John Robert Halston and the three co-heiresses-at-law of the testator were made respondents, but only one of the co-heiresses asserted a claim and appeared to support it :—

Held, that the testator must have contemplated some person who was alive at the date of his will to be the object of his bounty ; and on the extrinsic evidence, which was admissible, the testator intended to devise the property to John Robert Halston.

In re Ely (1891) 65 L. T. 452, not followed.

In re Ofner [1909] 1 Ch. 60, 63, followed.

Held, further, that the costs of the successful respondent must be paid by the unsuccessful respondent according to *In re Buckton* [1907] 2 Ch. 406, 415. *In re* HALSTON. EWEN *v.* HALSTON - - - - - **Eve J. 435**

10. —— *Perpetuity — Legal Limitations — Strict Settlement — Power to Trustees to enter during Minority of Tenant in Tail—Omission of Words "by purchase"—Receipt and Application of Rents—Surplus Rents to be applied in Discharge of Incumbrances on other Estates—Implication of Antecedent Estate—Indestructibility —Minority Clause — Invalidity — Will — Construction.*

The testator devised four estates, three of which he settled to uses in strict settlement under which an infant was now tenant in tail of the C. estate. The fourth estate he limited to trustees for a term of 1000 years upon trust out of the rents and profits to discharge the incumbrances upon all the estates in a certain order, and subject thereto he settled the said estate to the uses of the two estates other than the C. estate. The will contained a provision as to each estate that if any person who, if the provision had not been inserted therein, would for the time being be entitled to the possession or receipt of the rents and profits of such estate as tenant for life or in tail should be under the age of twenty-one years, then and in such case and as often as the same should happen the trustees of the will should enter into possession or receipt of the rents and profits of the estate, and should during the minority of such person keep up the mansion house and manage the property, with power (inter alia) to hold manorial courts and accept surrenders of leases ; and should maintain the infant, and apply the surplus rents and profits in the same way as those of the fourth estate. Upon an originating summons to determine the validity of the minority clause Warrington J. held that the trustees in order to enable them to execute the powers given to them by the clause must have by implication a legal estate vested in them antecedent to the estate tail and not capable of being destroyed by barring the entail ; that this estate would continue during the whole of the limitations in the will ; and that the clause was consequently void for perpetuity :—

Held, on appeal, that there was no necessity for implying any estate at all in the trustees, for that without any such estate they could enter and take possession and exercise the powers entrusted to them, and the mere inclusion in those powers of one (that of holding manorial courts) which could not be exercised without their having the legal estate did not operate so as to change the whole character of the settlement. At most it was only a power, and not a trust, to do something which the law would not allow. The minority clause was therefore valid.

Decision of Warrington J. [1911] 1 Ch. 255, reversed. *In re* EARL OF STAMFORD AND WARRINGTON. PAYNE *v.* GREY - **C. A. 343**

11. —— *Remoteness—Limitations after Estate Tail—Legal and Beneficial Interests—Periods of Ascertainment—Determination of Estate Tail —Life in being at Testator's Death and Twenty-one Years after—Contingency of attaining the Age of Twenty-one Years—Validity.*

The testator devised his real estate unto and to the use of his trustees and their heirs upon trust to pay the net rents and profits to his brother during his life and after his death to stand seised of his real estate upon trust for the first and other sons of his brother successively in tail with remainder upon trust for the first and other daughters of his brother successively in tail, and if the trusts for his brother for life and for his issue in tail should fail or determine then the testator directed his trustees on such failure or determination to sell his real estate and hold the net proceeds of sale thereof upon trust for such of the testator's five cousins, naming them, as should be living when the said direction for sale should come into operation (each share to be retained upon the usual trusts of a settled share for such cousin for life and after his or her death for his or her children), provided always that if any of his said five cousins should die before the aforesaid direction for sale should come into operation leaving a child or children living when such direction should come into operation who being male should attain twenty-one, or being female should attain twenty-one or marry, then and in every such case the last-mentioned child or children should take, and if more than one equally between them, the share to which his, her, or their parent would have been entitled for life if such parent had not died before the direction for sale had come into operation.

The testator died in 1902. His brother died without issue in 1911. Three out of the five cousins had died before the brother's death, one of them leaving a child still an infant. On a summons to determine whether the above trusts were void for remoteness :—

Held, that inasmuch as all the persons to take and the shares in which they were to take must necessarily be ascertained, if not at or before the determination of the estates tail, at any rate within a life in being at the testator's death and twenty-one years after, the trusts of the proceeds of sale subsequent to the determination of the estates tail did not offend against the rule against perpetuities, and were valid.

The statement of the law by James L.J. in *Heasman* v. *Pearse* (1871) L. R. 7 Ch. 275, 282,

283, applied and supplemented. *In re* HAYGARTH. WICKHAM *v.* HOLMES – **Joyce J. 510**

12. —— *Shares to Children—Gift over to Survivors—"In case of the death"—Vesting—Divesting—Will—Construction.*

Where a testator, after devising and bequeathing his estate (from and after the decease of his widow, to whom he had given a life interest) to be divided between his children, naming them, added after the testatum a clause that, in case of the death of any one or more of the children, the share or shares should be divided between the survivors :—

Held, that the clause referred to death only in the testator's lifetime, and that a child who survived the testator and died before the tenant for life was entitled equally with those who survived the tenant for life to share in the testator's estate. *In re* POULTNEY. POULTNEY *v.* POULTNEY – – – – **Joyce J. 245**

13. —— *Specific Legacy—Definite Number of the Shares belonging to Testator in Company A—Sub-division of Shares—Will speaking from Death—Contrary Intention—Ademption—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 24.

Specific bequest of "twenty-three of the shares belonging to me in" company A.

At the date of his will the testator held 104 original 80*l.* shares.

At his death he held 416 new 20*l.* shares, each original 80*l.* share having been sub-divided into four new 20*l.* shares :—

Held, that as the bequest was a definite specific bequest of a thing that could neither be increased nor diminished by events subsequent to the will, there was a sufficient contrary intention on the face of the will to exclude s. 24 of the Wills Act, 1837, and the bequest referred to the 80*l.* shares existing at the date of the will.

Goodlad v. *Burnett* (1855) 1 K. & J. 341, 348 ; *In re Gibson* (1866) L. R. 2 Eq. 669, 672 ; and *In re Slater* [1907] 1 Ch. 665, 670, applied.

In re Gillins [1909] 1 Ch. 345 (a general legacy), distinguished.

Held, also, that as the twenty-three original shares, though changed in name and form, substantially existed in their sub-divided form, there was no ademption, but that ninety-two of the new shares passed by the specific bequest.

In re Slater [1907] 1 Ch. 665, 672, applied. *In re* CLIFFORD. MALLAM *v.* MCFIE **Swinfen Eady J. 29**

14. —— *Substitutionary Gift—Will following the Words of the Wills Act*, 1837 (7 *Will.* 4 & 1 *Vict. c.* 26), *s.* 33—*Will—Construction.*

A testatrix by her will (made in 1897) gave her residuary estate to trustees, upon trust to convert the same, and to pay four seventeenth parts or shares of the proceeds unto her brother B. for his own absolute use, two seventeenth shares thereof to her brother J. absolutely, one seventeenth share to her niece A., and two seventeenth shares to her nephew S., and after disposing of the other eight seventeenth shares the will provided that if any of these four persons should die in the lifetime of the testatrix

without leaving issue living at her death, his or her share should be held in trust for the other beneficiaries. There was no dispute as to this part of the will, but later on it contained the following words :—"I declare that if any of them my said brothers B. and J., my niece A., and my said nephew S., shall die in my lifetime leaving issue, and any of such issue shall be living at my death, the benefits hereinbefore given to him or her so dying shall not lapse, but shall take effect as if his or her death had happened immediately after mine."

S. died before the testatrix, namely in 1906, leaving issue who survived the testatrix, and having made a will.

J. also died before the testatrix, namely in 1909, leaving issue who survived the testatrix, and having made a will :—

Held, following the decision of Joyce J. in *In re Clunies-Ross* [1912] W. N. 33, that the shares of J. and S. did not lapse as undisposed of, but went to their respective legal personal representatives as parts of their respective estates.

In re Gresley's Settlement [1911] 1 Ch. 358, and *In re Scott* [1901] 1 K. B. 228, distinguished.

In re GREENWOOD. GREENWOOD *v.* SUTCLIFFE – – – – **Parker J. 392**

15. —— *Tenant for Life and Remainderman—Will—Construction—Residuary Devise and Bequest—Trust to sell and convert—Power to postpone—Power to Trustees to pay for Repairs out of Capital or Income—"Rents, dividends and interest and other produce thereof" pending Conversion to be deemed Income—Lease by Testator—Repairing Covenants—Breach—Dilapidations—Damages recovered by Trustees—Capital or Income—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 53.

Testator by his will devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale and conversion with power to suspend conversion for such period as they should judge expedient, and pending the conversion of his real estate to pay for repairs either out of capital or income, and he provided that for the purposes of enjoyment and transmission under the trusts therein contained his real and personal estate should be considered as money from the time of his decease and that the "rents, dividends and interest and other produce thereof" respectively to accrue due after his decease and until the actual sale, conversion, and getting in thereof should be deemed the annual income thereof. The testator then directed his trustees to hold the proceeds of his residuary estate, after payment thereout of his debts and funeral and testamentary expenses, upon trust to divide the same into certain shares, some of which he settled.

At his death the testator was entitled to a freehold theatre which was subject to a lease granted by him. The lease contained certain repairing covenants by the lessee. The lessee did not perform these covenants, and some years after the testator's death the trustees brought an action against him for breach of covenant and recovered a certain sum of money by way of damages :—

WILL—*continued.*

Held, that the money recovered by the trustees as damages must be treated as corpus of the testator's residuary estate.

In re Lacon's Settlement [1911] 2 Ch. 17, distinguished.

In re PYKE. BIRNSTINGL *v.* BIRNSTINGL. **Warrington J. 770**

16. —— *Trust for Conversion with Power to postpone—Tenant for Life and Remainderman—Unauthorized Investments retained—Leasehold sub-let at a Loss—Income.*

A testator gave his residuary estate upon trust for sale and conversion with a discretionary power to postpone sale and conversion, and directed the net proceeds of sale to be invested on trust securities and held in trust for his wife for life with remainder to his sons. The will contained no direction as to the income of the estate pending conversion. The estate consisted largely of unauthorized securities, some of which were non-dividend paying and some paid more and some less than 4 per cent. interest :—

Held, that the tenant for life was entitled as from the death of the testator to interest at 4 per cent. on the capital value of the unauthorized securities to be calculated, not on each of the unauthorized securities separately, but on the aggregate value of all the unauthorized securities ; and that if in any year the tenant for life on that basis received more than the actual income of the unauthorized securities, the overpayment must be adjusted out of her subsequent income.

The testator was possessed of a residential flat which he held for a short term of years at a rack rent. The executors, being unable to sell or surrender it, sub-let it at a loss of 50*l.* per annum :—

Held, that the 50*l.* per annum was to be deducted from the income of the residuary estate as an outgoing of the estate.

The principle of *Allen* v. *Embleton* (1858) 4 Drew. 226, applied. *In re* OWEN. SLATER *v.* OWEN – – – – **Neville J. 519**

17. —— *Vesting—Gift to Children at Twenty-three—Remoteness—Will—Construction.*

In considering whether the trusts of a will are void for perpetuity the Court must first construe the gifts according to the ordinary canons of construction, and then consider whether any part of it, as so construed, offends against the perpetuity rule ; and it cannot construe the gift otherwise than according to its natural meaning because, if so construed, it would offend against the rule, though possibly, if the gifts might equally well be construed in two ways, one only of which would offend against the rule, the Court might adopt the other construction.

The creation in trustees of a mere discretionary power to apply the income of an expectant share (given to an individual or class contingently upon the attainment of a certain age) for the maintenance or benefit of the beneficiary, with a direction to accumulate the income not so applied for the benefit of the persons who ultimately attain a vested interest in the share, does not vest the gift originally given contingently.

WILL —*continued.*

Legacies were given to trustees, upon trust to pay the income to M., the daughter of the testatrix, for life, and after her death upon trust as to capital and income for all or any of her children who should be living at her death, and, being a son or sons, should attain the age of twenty-three years or survive the survivor of the testatrix and M. for the period of twenty-one years, or, being a daughter or daughters, should attain the age of twenty-three years or marry, and if more than one in equal shares as tenants in common. There were in the will the usual advancement clause and a clause giving the trustees a discretionary power to apply the income of the expectant, contingent, presumptive or vested legacy or share of any grandchild of the testatrix under the trusts of the will for or towards his or her maintenance, education, or benefit. M. survived the testatrix and had two children, both of whom attained the age of twenty-three years :—

Held, that the gifts to the children of M. were contingent interests only, and that the trusts declared in their favour were void for remoteness.

Fox v. *Fox* (1875) L. R. 19 Eq. 286, distinguished. *In re* HUME. PUBLIC TRUSTEE *v.* MABEY – – – – – **Parker J. 693**

—— Charity.
See under CHARITY.

—— Costs—Attorney-General—Construction of will—Originating summons — Practice —Charitable Trusts Act, 1853 – **779**
See COSTS.

—— Debt — Release — Cancellation — Will —Construction — Deduction of debts from settled legacies — Advances by testator – – – – – **498**
See DEBT.

WINDING-UP—Company.
See under COMPANY.

WORDS :—

—— "Building" – – – – – **83**
See GAS.

—— "Colony" – – – – – **55**
See TRUSTEE. 2.

—— "in case of the Death" – – – **245**
See WILL. 12.

—— "Dependency" – – – – **55**
See TRUSTEE. 2.

—— "Money" – – – – – **388**
See WILL. 1.

WORKHOUSE—Supply of water for domestic purposes—"Private dwelling house"—Bristol Waterworks Act, 1862 – **846**
See WATER. 2.

WORTHING GAS ACT, 1907.
See under GAS.

YORKSHIRE REGISTRIES — Mortgage — Priority — Merger — Reconveyance and new mortgage without notice of intermediate charge—Constructive charge
See MORTGAGE. 3. **735**

BRADBURY, AGNEW, & CO. LD., PRINTERS, LONDON AND TONBRIDGE.

BIBL. LONDIN. UNIV.

DL - 3 OCT 1980